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Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1929.

No. ~~425~~ 18

WILSON LUMBER COMPANY OF FLORIDA, - Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., - - Appellees.

Appeal from the District Court of the United States for the Northern District of Georgia.

BRIEF ON BEHALF OF THE WILSON LUMBER COMPANY OF FLORIDA, APPELLANT.

J. V. NORMAN,
Counsel for Wilson Lumber Company, Appellant.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 495.

WILSON LUMBER COMPANY OF FLORIDA, - *Appellant,*

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., - - *Appellees.*

Appeal from the District Court of the United States for the Northern District of Georgia.

BRIEF ON BEHALF OF THE WILSON LUMBER COMPANY OF FLORIDA, APPELLANT.

REFERENCE TO THE OFFICIAL REPORT OF THE OPINIONS DELIVERED IN THE COURT BELOW.

The opinions in the Court below are reported in 30 Fed. (2) 116, and 31 Fed. (2) 580, and will also be found in the record at pages 44 and 167. The opinion of the Interstate Commerce Commission is reported in 146 I. C. C. 717, and will also be found in the record at page 790.

STATEMENT AS TO JURISDICTION.

On January 27, 1930, the Court announced its finding that probable jurisdiction had been shown by statement filed by appellants on December 2, 1929, and served upon all opposing counsel wherein jurisdiction was assailed. This being a proceeding to enjoin an order of the Interstate Commerce Commission jurisdiction is conferred by the District Court Jurisdiction Act, 38 Stat. L. 219.

STATEMENT OF THE CASE.

This case comes to the Supreme Court on appeal from an order of the United States District Court for the Northern District of Georgia, sitting as a specially constituted Three Judge Court under the provisions of the District Court Jurisdiction Act, 38 Stat. L. 219, denying an injunction restraining the enforcement of an order issued by the Interstate Commerce Commission in Georgia Public Service Commission v. Atlantic Coast Line Railroad Company, Docket No. 18364, and dismissing the bill seeking such injunction.

Two other cases were heard by the Court below jointly with this case, wherein it was also contended that the same order of the Interstate Commerce Commission was unlawful, and should be enjoined, and the opinions of the District Court on original hearing (R. 44), and upon rehearing (R. 167), disposed of all three cases and similar individual decrees were entered by the District Court in all three proceedings. Complain-

ants below in the other two cases, are now before this Court with their individual appeals, being No. 493, State of Florida and E. S. Wells, E. S. Matthews, *et al*, appellants, v. United States, Interstate Commerce Commission, *et al*, appellees, and No. 494, Brooks Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company, appellants v. United States, Interstate Commerce Commission, *et al*, appellees, and these three cases are presented on a common record.

The case before the Interstate Commerce Commission had its inception by the filing of a complaint with it by the Georgia Public Service Commission, on behalf of the Georgia shippers and receivers, alleging that the interstate rates charged and received by the defendant, Atlantic Coast Line Railroad Company, on logs, except walnut, cherry, and cedar, in carloads, from Florida points to points in Georgia, were unjust and unreasonable, and that the charging and receiving of greater compensation for the transportation of logs moving in interstate commerce from Florida and Georgia than was charged and received for the transportation of like property moving in intrastate commerce within the State of Florida, unjustly and unlawfully discriminated against the Georgia log shippers, and gave undue preference and advantage to Florida intrastate log shippers and that the intrastate Florida rates voluntarily established by the defendant, Atlantic Coast Line Railroad, gave an undue and unreasonable preference and advantage to intrastate shippers in Florida and "are unduly prejudicial and

disadvantageous to the interstate shipper in Georgia, and causes undue and unreasonable and unjust discrimination against interstate commerce, in violation of Section 13 of the Interstate Commerce Act" (R. 193).

The Atlantic Coast Line answered denying that its interstate rates were unjust or unreasonable or that it was responsible for any discrimination and praying that the complaint be dismissed (R. 199).

Numerous persons and corporations were permitted to intervene and thereafter the Commission held hearings at which evidence was introduced and the case was briefed and argued by counsel. On August 2, 1928, the Commission rendered its opinion (R. 790), and entered its order (R. 800). In its opinion the Commission found:

> "While complainant assails the rates from all points on defendant's lines in Florida to all points on its line in Georgia, the record shows that in so far as the interstate rates are concerned relief is desired only with respect to rates on logs, except walnut, cherry, and cedar, from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, hereinafter referred to as North Florida, to destinations in Georgia for distances not exceeding 170 miles" (R. 792).

The Commission held that the interstate rates from Florida points to Georgia destinations, for said distances of 170 miles, unreasonable and fixed a scale of

rates to be thereafter charged. These interstate rates were made effective in accordance with the order of the Commission, without objection from any one, and are not involved in this proceeding.

The Commission further found, as follows:

> "We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce" (R. 799).

Pursuant to this finding the Commission, by its order, directed the defendant to maintain rates "in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof, as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia" (R. 801). It is this order requiring the increase of Florida intrastate rates which appellants seek to enjoin.

The appellant, Wilson Lumber Company, whose plant is located in Central Florida and who draws its logs from Central and Southern Florida, had not up to this time been a party to the proceeding as it did not understand that its rates were involved. Upon obtaining information that the order of the Commission

was subject to a construction which would increase the rates paid by it, Wilson Lumber Company filed with the Interstate Commerce Commission its petition for leave to intervene and for reconsideration and reargument. Other interveners filed petitions for rehearing which, together with the petition of this appellant, were overruled.

The appellant thereupon instituted this action as complainant in the Court below, seeking to enjoin the order of the Commission. The Court below, in its opinion (R. 44), stated the main questions presented by the complaint, as follows:

> "The contentions of invalidity make these main questions: 1. Is the order within the lawful powers of the Commission? 2. Is it within the issues sought to be investigated and made after full hearing of them? 3. Is it arbitrary because unsupported by sufficient evidence? 4. The State of Florida and Wilson Lumber Company, construing the order as abrogating the Coast Line's intrastate log rates throughout the State of Florida rather than within the limited territory for which new interstate rates were fixed, make the special and newly raised contention of an entire want of evidence to support so broad an order."

It was urged upon the Court below that the order was void, among other reasons, because, being statewide in scope, it was unjustified according to the rulings in *Wisconsin Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563, and *Illinois Central* v. *Utilities Commission of Illinois*, 245 U. S. 493, since those

cases held that a statewide increase in rates may not result from a finding by the Commission of discrimination against persons and localities at border points. The Court considered these contentions at length and disposed of them as follows (R. 50):

> "A more troublesome question is that raised by the State of Florida and Wilson Lumber Corporation (paragraph 18e of the one bill and paragraphs 7 and 10 of the other) that the evidence, and the findings of the Commission, related only to north Florida, while the order complained of fixed intrastate rates for the whole of Florida, and was unjustified according to the rulings in Wisconsin R. R. Com. v. C. B. & Q. R. R., 257 U. S. 563, and Illinois Central R. R. Co. v. Public Utilities Comm. of Ill., 245 U. S. 493. From a cursory search of the record it appears to be true that the evidence, though often broadly phrased, really related to the logs in north Florida, a territory described by the Commission in its order establishing new intrastate rates as north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs. No interest, apparently, was taken by any one in the territory more remote from the Georgia line, evidently because the class of logs involved could, under no circumstances, be profitably moved so great a distance. Although the complaint covered the whole of Florida, the real contention, and the Commission's own action upon the interstate rates, were limited to that northern territory, and the evidence related only to it. The precise condition in south Florida, and whether there could or would be any interstate commerce in

logs from that region, were never investigated. The language of the order passed touching the intrastate rates can be construed as fixing rates for the whole state. The two bills above referred to so construe it. The respondents in answering the bill of the State of Florida seem to deny this construction. The answers to the bill of Wilson Lumber Company vary. Those of the Interstate Commerce Commission and Georgia Public Service Corporation do not commit themselves to any construction, but leave the order to speak for itself. We think it can also be construed as limited to points of origin on the Coast Line railroad north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs. The existence and availability of logs at such origins was fully investigated and at others not. The Commission confined its order on interstate rates expressly to these origins, and dealt with the intrastate rates only by reference to the order fixing the interstate rates, declaring that the rates 'in intrastate commerce within the State of Florida shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia. The preceding paragraph fixes only one-way rates, and was limited to origins on the Coast Line railroad in the State of Florida north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs. The destinations in Georgia there referred to were, of course, excluded by the words 'within Florida' in the order as to intrastate rates. Otherwise the intrastate rates were to be the same.

> Since the first construction would probably nullify the order, we think we should follow the established rules in construing contracts and statutes, holding to the latter construction which would uphold it. Territorial indefiniteness of the order was held aided by the other proceedings in American Express Co. v. Caldwell, 244 U. S. 617."

The Court thereupon denied the injunction and dismissed the bill. The order of the Commission as thus construed by the District Court was, by its terms, to become effective on February 8, 1929. The Atlantic Coast Line Railroad, in disregard of the interpretation of the Commission's order by the District Court, proceeded to publish the prescribed schedule of rates for application throughout the State of Florida. Litigation ensued in both State and Federal Courts, which it is not necessary to here describe, the purpose of which was to require the Atlantic Coast Line Railroad to confine the application of the increased rates to the territory to which the Court below had confined the application of the order in its opinion. While this litigation was pending and one day before the effective date of its order, to-wit, February 7, 1929, the Interstate Commerce Commission entered an order (R. 912), providing that its said order of August 2, 1928,

> "be, and it is hereby changed in language for the purpose of clarification as follows: In the fourth paragraph of said order of August 2, 1928, substitute for 'within the State of Florida,' the following: 'within and throughout the entire State of Florida, without exception.'"

Thereupon appellants applied for a rehearing (R. 985), before the Court below and filed amended and supplemental bills (R. 987) setting forth the amendment made in its order by the Interstate Commerce Commission and seeking an injunction against the order as thus amended. The Court granted the rehearing (R. 1000), and reconsidered the matter because (R. 167):

> "The ambiguity which we formerly found in the order of the Commission is now removed and the intent made clear that the intrastate log rate in question is to be changed over the entire Coast Line system in Florida. * * * We have therefore to examine the record more closely and see if a statewide change of the rate is sustainable."

The Court affirmed its holding that a Statewide order could not be sustained because of discrimination against shippers and localities in interstate commerce, saying (R. 168):

> "No such case is, therefore, shown by the evidence as to justify a statewide order altering the intrastate rate because of undue prejudice to shippers and localities, or because of undue discrimination against the particular interstate commerce in such logs."

After so holding, the Court took up the question of discrimination against general interstate commerce, saying (R. 168):

> "There is, however, another discrimination against general interstate commerce when one

> state rate or the system of state rates is so low as to throw an undue burden on the revenues arising from interstate commerce in order to sustain the carrier engaged in both kinds of commerce."

The Court then proceeded to hold that the proceeding before the Commission had presented this question and further held that there was sufficient evidence to sustain the finding of the Commission, saying (R. 168):

> "Upon the hearings, it is true that the parties appeared interested mostly in North Florida because of prejudice to shipments there, and the great bulk of the evidence related thereto, but in addition to the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions and the railroads must have in such matters, there was a presentation in the evidence by the Coast Line and by the Florida Commission respectively, of the cost of service under the attacked rate and of its remunerativeness. Certainly no other litigant could have known the facts better than they. In rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself, and make its own conclusion from them."

The Court therefore entered an order denying the injunction and dismissing the bill and the case is here on appeal from that order (R. 1013).

SPECIFICATION OF ERRORS (R. 1015).

The assignments of error here relied upon for the reversal of the court below are as follows:

The District Court erred:

I.

In denying the relief prayed and dismissing the bill and the supplemental bill.

II.

In holding that the order of the Interstate Commerce Commission, of August 2, 1928, as amended on February 7, 1929, was within the lawful powers of the Commission.

III.

In holding that said order of the Interstate Commerce Commission was within the issues sought to be investigated.

IV.

In holding that said report and order of the Interstate Commerce Commission was made after a full hearing of the questions determined in the report and upon which the order was predicated.

V.

In holding that said order of the Commission was supported by sufficient evidence and was not arbitrary.

VI.

In holding that the said order of the Interstate Commerce Commission did not constitute an unlawful invasion of the rights and powers of the State of Florida reserved to it by the Constitution of the United States.

VII.

In holding that the Interstate Commerce Commission "was at liberty to supplement" the facts shown.

VIII.

In holding that the Commission was justified "in rejecting the inclusion of slight net income" asserted by the witnesses and predicating said holding upon the right of the Commission to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the Railroads must have in such matters."

IX.

In holding that the Interstate Commerce Commission is vested with authority to condemn an intrastate rate charged by a single railroad on a single commodity on the ground that such rate discriminates against general interstate commerce which it is held that there is no discrimination against particular interstate commerce or against shippers and localities in interstate commerce.

X.

In failing and refusing to find that the issue as to whether the lower level of the Florida intrastate log rates of the Atlantic Coast Line Railroad cause or would cause unjust discrimination against interstate commerce in violation of Section 13 when construed with Section 15a of the Interstate Commerce Act, was eliminated from the proceeding before the Commission by the parties thereto.

XI.

In failing and refusing to find that there was no substantial evidence before the Interstate Commerce Commission supporting or tending to support the finding by the Commission that the continued maintenance by the Atlantic Coast Line Railroad of the Florida intrastate log rates would subject interstate commerce to unjust discrimination in violation of Sections 13 and 15a of the Interstate Commerce Act.

XII.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because there was no substantial evidence to support the finding that the Florida intrastate log rates of the Atlantic Coast Line Railroad were less than reasonably compensatory.

XIII.

In failing and refusing to find that there was no substantial evidence of record before the Interstate Commerce Commission showing or tending to show that substantially similar circumstances and conditions surrounded the transportation of logs by railroad on the one hand over the Atlantic Coast Line Railroad Company between points in Florida and on the other hand from origins on its line in Florida to destinations in Georgia.

XIV.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because they seek to interfere with the voluntary continuance of the Florida intrastate rates on logs over its line by the Atlantic Coast Line Railroad Company without any substantial evidence showing or tending to show that the continuance of such Florida intrastate log rates in any way violates the provisions of the Interstate Commerce Act, and without any request or petition by said Atlantic Coast Line Railroad Company to either the Interstate Commerce Commission or to the Florida Railroad Commission to increase such Florida intrastate log rates, and without any other effort whatsoever by said Atlantic Coast Line Railroad Company to increase said rates.

XV.

In failing and refusing to find that the intrastate rates, investigated by the Interstate Commerce Commission, were not those contemplated by Section 13 (4) of the Interstate Commerce Act, as amended, because same were voluntarily initiated and maintained by the carrier, and therefore not "made or imposed by authority of any State," within the description of Section 13 (3) of said Act.

XVI.

In failing and refusing to find that the report and order of the Interstate Commerce Commission are unlawful because the facts of record before the Commission do not show that there is or would be any real or substantial injury to or restriction upon interstate commerce as a consequence of the continued maintenance of the Florida intrastate log rates of the Atlantic Coast Line Railroad Company.

XVII.

In failing and refusing to hold that Section 13 of the Interstate Commerce Act is in violation of the Constitution of the United States, and especially the Tenth Amendment thereto, if same be construed to vest in the Interstate Commerce Commission the powers here asserted.

XVIII.

In failing and refusing to find that the report and order of the Interstate Commerce Commission as

amended are unlawful because there were no facts of record in such proceeding before the Interstate Commerce Commission showing, or tending to show, nor did the Interstate Commerce Commission find any facts sufficient to constitute, unjust discrimination against interstate commerce in violation of the provisions of Section 13 of the Interstate Commerce Act.

XIX.

In failing and refusing to find that the report and order of the Interstate Commerce Commission as amended are unlawful because said Commission has thereby sought to embrace within the scope thereof all rates of the Atlantic Coast Line Railroad Company on logs between any stations on its line wholly within the State of Florida for any length of haul not exceeding 170 miles and in any portion of such state, although there was no case or controversy submitted to that tribunal or pending before it involving in any way freight rates of the Atlantic Coast Line Railroad Company on logs within Florida, except for hauls of 170 miles and less over such railroad wholly within the so-called Northern portion of the State of Florida.

XX.

In failing and refusing to hold that the proceeding before the Commission was essentially a proceeding instituted in behalf of Georgia shippers to properly relate the rates on logs from a restricted territory in Northern Florida to points in the State of Georgia with the rates on logs in the said restricted territory

in Northern Florida and did not present nor could not present the question that the rates on logs throughout Florida constituted an undue discrimination against general interstate commerce or put an undue burden on the revenues arising from interstate commerce and accruing to the carriers subject to the Interstate Commerce Act and that, therefore, the Commission was without power to make the order complained of.

SUMMARY OF ARGUMENT.

The points raised by the appellant in the bill of complaint before the Court below, and urged here as reasons why the order of the Commission should be enjoined as null and void, are:

I.

The order of the Commission, being state wide in scope, cannot be sustained under the Commission's power, granted by Section 3 of the Act, to remove undue prejudice and preference as between particular persons, places and commodities.

II.

The question as to whether all Florida log rates charged by the Atlantic Coast Line Railroad were so low as to constitute discrimination against interstate commerce generally, was not submitted to the Commission or tried by it in the proceeding before it.

III.

The Court below erred in holding that the Interstate Commerce Commission was at liberty "to supplement"

the facts shown, and to rely upon "the common knowledge and skill in rate matters that the Interstate Commerce Commission, The Georgia & Florida State Commissions and the Railroad Commission must have in such matters."

IV.

The intrastate rates for transportation of logs wholly within the State of Florida were not rates "made or imposed by authority of any State" within the description of Section 13 (4) of the Interstate Commerce Act and the Interstate Commerce Commission is therefore without power to regulate and fix said rates.

V.

The order of the Interstate Commerce Commission was made without sufficient evidence to support its finding that the Florida interstate log rates discriminate against interstate commerce as a whole.

VI.

It is not sufficient that a finding of the Interstate Commerce Commission that intrastate rates discriminate against interstate commerce be supported by substantial evidence only, as in cases involving interstate rates, but such finding must be in accord with the preponderance of the evidence.

VII.

The order of the Interstate Commerce Commission constitutes an Act in contravention of The Constitution of The United States.

VIII.

The action of the Interstate Commerce Commission under the circumstances of this case constitute an unwarranted exercise of Federal power and unnecessary, hasty and harsh interference with the power of the State.

ARGUMENT.

I.

The Order of the Commission, Being State Wide in Scope, Cannot be Sustained under the Commission's Power, Granted by Section 3 of the Act, to Remove Undue Prejudice and Preference as Between Particular Persons, Places and Commodities.

The Court below in both of its opinions herein correctly held that the Commission had no power to order an increase in all of the Florida rates because of undue prejudice to shippers and localities or because of undue discrimination against the particular interstate commerce. In as much as no exception was taken by any of the defendants below to this finding of the District Court and there is no appeal from such finding, we take it that this question is judicially settled. However, in the event that it should be urged in this Court that the Commission's order may be sustained under the powers granted by Section 3 of the Act to remove discrimination against persons and localities and particular commerce, we desire to briefly review the situation with reference thereto.

The Commission in its report (R. 792), says:

"While complainant assails the rates from all points on defendants'-lines in Florida to all points on its line in Georgia, the record shows that in so far as the interstate rates are concerned relief is desired only with respect to rates on logs, except walnut, cherry, and cedar, from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs, hereinafter referred to as North Florida, to destinations in Georgia for distances not exceeding 170 miles."

An examination of the evidence supports the finding of the lower Court, that (R. 50):

"Although the complaint covered the whole of Florida, the real contention, and the Commission's own action upon the interstate rates were limited to that northern territory, and the evidence related only to it. The precise condition in South Florida, and whether there could or would be any interstate commerce in logs from that region, were never investigated."

This branch of the case comes squarely under the rule laid down by this Court in *Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563, 66 L. ed. 371, to the effect that the Commission may not order an increase in all intrastate rates because of discrimination at border points. This Court there said (p. 579):

"The order in this case, however, is much wider than the others made in the proceedings following the Shreveport and Illinois C. R. Co. cases. There as here, the report of the Commis-

sion showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted cannot give the order validity. As said by this court in the Illinois Central Railroad case: 'It is obvious that an order of a subordinate agency, such as the commission, should not be given a precedence over a state rate statute, otherwise, valid, unless, and except so far as, it conforms to a high standard of certainty.' See also American Express Co. v. S. D., 244 U. S. 617, 627, 61 L. ed. 1352, 1359, P. U. R. 1917, F. 45, 37 Sup. Ct. Rep. 656."

We submit, therefore, that the state wide order of the Commission increasing Florida log rates, cannot be sustained on the ground that such rates constitute a discrimination against persons or localities or particular interstate commerce. We now come to consideration of the question as to whether the Commission in this proceeding had authority to order an increase in the log rates throughout the State of Florida, on the ground that same constitute discrimination

against interstate commerce generally and if it did have such power whether there is sufficient evidence to support the finding necessary to its exercise.

II.

The Question as to Whether all Florida Log Rates Charged by the Atlantic Coast Line Railroad were so Low as to Constitute Discrimination Against Interstate Commerce Generally, was not Submitted to the Commission or Tried by it in the Proceeding Before it, and the Order of the Interstate Commerce Commission being Based on a Finding Thereon was made Without the Full Hearing Required by the Interstate Commerce Act.

Proceedings before the Interstate Commerce Commission must be initiated in accordance with Section 13 of the Interstate Commerce Act. Under the provisions of subsection 1 of Section 13, complaints may be instituted by "any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier." Subsection 2 authorizes complaints by a State Commission or the institution of an inquiry by the Interstate Commerce Commission on its own motion. Subsection 3 relates to rates "made or imposed by authority of any State" and provides that petition for investigation of such rates be filed by "the carrier concerned." This was an adversary proceeding and is what is known as a complaint and answer case,

as distinguished from an investigation instituted by the Commission, whether on its own motion or on petition of "the carrier concerned." It was therefore instituted under either Subsection 1 or 2 of Section 13 of the Interstate Commerce Act. It could not have been brought under subsection 3 because it is not an investigation initiated by the Commission and, as we shall hereafter see, the rates brought in issue were not "made or imposed by authority of any State." The object of the complaint was stated in paragraph 3, as follows (R. 193):

> "That the object of this complaint is to secure reasonable rates on logs from all points on the Atlantic Coast Line Railroad, as hereinafter shown within the State of Florida to all destinations on the said Atlantic Coast Line Railroad in the State of Georgia, and to have removed any unjust discrimination or undue prejudice found to exist as provided in the Interstate Commerce Act."

The complaint alleged (1) that the interstate rates on logs from shipping points in Florida to destinations in Georgia were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act; (2) that such rates unjustly and unlawfully discriminate against Georgia log shippers in violation of Section 2; and (3) that the rate adjustment was unduly prejudicial and disadvantageous to Georgia interstate shippers, giving undue preference and advantage to intrastate Florida log shipers in violation of Section 3. These were the allegations upon which the complaint

was tried. It is true that in paragraph 11 of the complaint, after alleging that the rates for transportation of logs between points in Florida give undue and unreasonable preference and advantage to intrastate shippers in Florida and are unduly prejudicial and disadvantageous to the interstate shippers in Georgia, there is added the phrase—"and cause undue and unreasonable and unjust discrimination against interstate commerce in violation of Section 13 of the Interstate Commerce Act."

No evidence was offered by the complainant, however, to show that the Florida intrastate rates discriminated against interstate commerce because too low, in fact, no evidence was offered by complainants to show that the Florida intrastate rates were low, but, on the contrary, the complainants undertook to show that the discrimination against Georgia shippers should be removed by establishing the Florida intrastate scale for interstate application. The principal, and in fact the only, witness for complainant stated (R. 417):

> "I have not prepared any schedule of rates to suggest being used as a means to remove the discrimination against Georgia manufacturers, as shown in our exhibit but do suggest and contend that the rates now being operated in Florida be extended into Georgia for interstate application."

The Chairman of the Georgia Public Service Commission, who also acted as its counsel at the hearing before the Interstate Commerce Commission, confirmed

the statement made by his witness. He asked counsel for Florida interveners (R. 420):

> "Are you opposed or not to the extension of the Florida rates under review here, being extended into Georgia?"

and then stated (R. 421):

> "It certainly is a very vital, relevant matter, and it seems to me Mr. Cotterill ought to be able to answer now, because that is all there is in the case, it is all that has ever been in the case, it is all that has ever been in the case, it is all we are asking for and all we hope to gain."

It will thus be seen that the complainant not only did not charge that the Florida intrastate rates were so low as to cast a burden on interstate commerce, but, on the contrary, insisted upon the use of such Florida intrastate rates as a yard-stick for the establishment of interstate rates. It was the relation of rates to which the complainant directed its attack and it insisted that the existing Florida intrastate rates should be used as the basis for establishment of a proper relationship. The only evidence bearing upon the question of the remunerativeness of the Florida intrastate rates was offered by the defendant, Atlantic Coast Line Railroad, and the interveners, Florida Railroad Commission. The Atlantic Coast Line Railroad offered such evidence for the purpose of establishing that the Florida intrastate rates, while remunerative (R. 526, 695) under the conditions under which the Florida traffic

was handled, which is largely in trainloads, were not sufficiently high for general application to traffic handled generally in single carload (R. 484, 504, 515). After this evidence was introduced the Florida Railroad Commission undertook to show by its accountant that the Florida intrastate rates produced a greater net revenue than had been shown by the Atlantic Coast Line R. R. (R. 629-641).

We therefore submit that a careful examination of the record discloses the fact that the question as to whether the intrastate rates were so low as to discriminate against interstate commerce generally was never tried in the proceeding before the Commission, yet it was upon a finding to this effect that the order of the Commission must find its justification. Accordingly there has been a total failure to afford the full hearing upon this question which the statute requires. In *I. C. C.* v. *L. & N.*, 227 U. S. 88, 91, this Court said:

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied, if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (citing many cases), or if the facts found do not support the order made (citing cases)."

In the *New England Divisions Case*, 261 U. S. 184, 200, this Court further said:

"Whether a hearing was full must be determined by the character of the hearing, not by that of the order entered theeron."

Observing this principle and looking to the character of the hearing here had, it cannot be questioned that the hearing in this case was as to discrimination as between persons and localities in interstate commerce. True, appellant and other interveners could have introduced evidence to show that the intrastate rates did not discriminate against interstate commerce generally, but since the complainants introduced no evidence on the subject such parties had a right to rely upon no order being based on a finding thereof.

III.

The Court below Erred in Holding that the Interstate Commerce Commission was at Liberty "to Supplement" the Facts Shown, and to Rely upon, "the Common Knowledge and Skill in Rate Matters that the Interstate Commerce Commission, the Georgia & Florida State Commissions and the Railroad Commissions Must have in such Matters."

In its opinion the Court below states (R. 168-169):

"Upon the hearings, it is true that the parties appeared interested mostly in North Florida because of prejudice to shipments there, and the great bulk of the evidence related thereto, but in addition to the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions

and the railroads must have in such matters, there was a presentation in the evidence by the Coast Line and by the Florida Commission respectively, of the cost of service under the attacked rate and of its remunerativeness. Certainly no other litigant could have known the facts better than they. In rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself and make its own conclusion from them."

This holding is in conflict with repeated decisions of this Court, holding that the Commission may not supplement the evidence before it by matters within its general knowledge or by papers in the Commission's files.

The case of *Interstate Commerce Commission* v. *L. & N.*, 227 U. S. 88, is perhaps the leading case on this subject. It was there insisted by the Government that the Interstate Commerce Commission, being an arm of Congress, was authorized to obtain such information as it considered necessary and to act on such information in making rates. The Court said (p. 93):

"The government further insists that the commerce act (26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3163) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such

information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of Section 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted and defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days."

The rule thus announced has been ever since adhered to. Of course, this is not to say that the Commission may not use its special training and expert knowledge in rate matters in considering the evidence before it, but only that it may not supplement that evidence with such knowledge and information as it may have obtained from other sources. In *United States* v. *Abilene & S. R. Co.,* 265 U. S. 274, commonly known as the Orient Divisions Case, the Court set aside an order of the Commission because it appeared that the Com-

mission had considered annual reports of the carriers on file with the Commission but which had not been introduced in the record in the case before the Commission. The Court there said: "Nothing can be treated as evidence which is not introduced as such." See also the following cases:

U. S. v. Los Angeles & S. L. R. Co., 273 U. S. 299;
St. Louis & O'Fallon Ry. v. U. S., 279 U. S. 461, 493;
I. C. C. v. L. & N., 227 U. S. 88, on the point here discussed, was also cited with approval in
U. S. v. L. & N. R. Co., 235 U. S. 314, 321;
R. R. Co. v. Finn, 235 U. S. 601, 606;
Philadelphia & Reading Ry. Co. v. U. S., 240 U. S. 334;
Seaboard Air Line R. R. v. U. S., 254 U. S. 57, 62.

As we have already seen, the only evidence offered as to the remunerativeness of the intrastate rates showed that such rates were remunerative and the Court below referred to this fact and then stated (R. 169): "In rejecting the conclusion of slight net income asserted by the witnesses the Commission did not rule out the basic facts shown but was at liberty to supplement them and construe them for itself and make its own conclusion from them." Under authority of the foregoing cases this holding of the Court cannot be sustained. It therefore appears, and in the absence of the authority to supplement the evidence, it must be held, that there was no substantial evidence before the Commission to support a finding that the rates were unremunerative since all of the evidence offered showed the rates to be remunerative.

IV.

The Interstate Rates for Transportation of logs Wholly Within the State of Florida were not Rates "Made or Imposed by Authority of any State" Within the Description of Section 13 (4) of the Interstate Commerce Act and the Interstate Commerce Commission is Therefore Without Power to Regulate and Fix said Rates.

The Interstate Commerce Act contains no direct grant to the Interstate Commerce Commission of power to increase any intrastate rates on the ground that same constitute a burden on or discriminate against interstate commerce generally. This Court, however, in Wisconsin Rate Case, 257 U. S. 563, 586, held:

> "The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission 'in the exercise of its powers to prescribe just and reasonable rates'; *i. e.,* powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail rela-

tion between that provision and the purpose of section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

Thus by reading Section 13, Subsection 4, together with Section 15a, and in order to carry out the purposes of the Act, the Commission obtains power to increase intrastate rates when, in a proper proceeding, such rates are found to discriminate against interstate commerce as a whole.

The Wisconsin case, however, as well as the companion case of *New York Passenger Fares,* 257 U. S. 591, were cases arising under Subsection 3 of Section 13, where the Commission, as a result of investigations instituted by itself pursuant to petition of the carriers, as provided in said section, found rates which had been fixed and imposed by State authority to be so low as to discriminate against interstate commerce as a whole. Moreover, each of said cases arose as a result of the refusal of State authority to permit intrastate rates to be subjected to the horizontal increases which the Interstate Commerce Commission, in the exercise of the duty laid upon it under Section 15a, had prescribed for all interstate rates. Here the intrastate rates, which the Commission orders increased, were not "made or imposed by authority of any State," nor has the Com-

mission ordered any general level for interstate log rates. The general increases prescribed by the Interstate Commerce Commission in its general orders under Section 15a, had been applied to the Florida intrastate log rates (R. 468, 472). The question, therefore, arises as to whether this Court will extend its interpretation so as to authorize the Interstate Commerce Commission, on the complaint of an interstate shipper, to increase a voluntarily maintained intrastate rate on a finding that such rate discriminates against interstate commerce as a whole. Subsections 3 and 4 were added to Section 13 by the Transportation Act of 1920. Subsection 3 reads in part as follows:

> "Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. * * *"

It is then provided by Subsection 4 that:

> "Whenever, in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and

interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination."

It will be seen that after Subsection 3 has provided for proceedings by the Commission where rates have been "made or imposed by authority of any State," Subsection 4 provides that "Whenever, *in any such investigation* the Commission after full hearing, etc." (Italics ours.) It is respectfully submitted, therefore, that Subsection 4, which impowers the Interstate Commerce Commission to prescribe intrastate rates so as to remove discrimination against interstate commerce, is confined to proceedings arising under Subsection 3, that the words in Subsection 4, "any such investigation," refer only to the investigation authorized by Subsection 3. This construction would leave to the State the primary right to prescribe intrastate rates and confer on the Federal Government the power to change those rates only after a finding that such rates discriminate against interstate commerce. Such a situation would give force and effect to the provision of the Interstate Commerce Act, which recognizes the right of the States to control in-

trastate rates. This Court has repeatedly held that the Interstate Commerce Commission's authority to control intrastate rates arises only where such control is necessary to the "efficient regulation of interstate commerce," and only when "there is a demonstrable injury and restraint upon interstate commerce which is real and substantial," Wisconsin case, *supra*.

B. & O. R. R. Co. v. I. C. C., 221 U. S. 612;
Southern R. R. v. U. S., 222 U. S. 20;
Mendon v. N. Y., N. H. & H. R. Co., 223 U. S. 1;
Houston, etc., R. Co. v. U. S., 234 U. S. 342;
Hammer v. Dagenhart, 247 U. S. 251;
Railroad Comm. v. C. B. & Q. R. Co., 257 U. S. 563;
Akron C. & Y. R. Co. v. U. S., 261 U. S. 184;
Dayton-Goose Creek Ry. Co. v. U. S., 263 U. S. 456;
Texas v. Eastern Texas R. Co., 258 U. S. 204;
Colorado v. U. S., 271 U. S. 153;
Arkansas Railroad Commission v. C. R. I. & P. R. Co., 274 U. S. 597.

It may be argued that in order to carry out the purpose of the Act it is necessary for the Interstate Commerce Commission to have the same power to order an increase in voluntarily maintained intrastate rates as the Court has held the Commission possesses as to rates that have been made or imposed by State authority. But aside from the improbability that the carriers will voluntarily maintain intrastate rates so low as to discriminate against interstate commerce, generally, the language of the statute would seem to vest power in the Interstate Commerce Commission only where the intrastate rates were "made or imposed by authority of

any State." It is elementary that the Commission has no powers except those expressly vested in it by statute, and giving to the words of the statute their ordinary meaning, the power to fix intrastate rates is vested only where rates made and fixed by State authority are found to discriminate against interstate commerce.

The Court below apparently held that because the Florida Commission had permitted the Florida intrastate rates voluntarily published by the carrier to become effective that the rates thereupon come within the class designated by Congress as "rates made or imposed by authority of any State." We submit that a rate initiated by the carrier and permitted by authority of a State is not a rate "made or imposed" within the intent of the statute. Obviously it was the purpose of the statute to give to the Interstate Commerce Commission power to increase rates only under such conditions as presented by the Wisconsin case and the New York Passenger Fare case, *supra,* where the State authority had fixed and imposed the rates and refused to permit them to be increased in accordance with the orders of the Interstate Commerce Commission prescribing the general level of rates necessary to carry out the purposes of Section 15a.

We therefore submit that the Florida intrastate log rates of the Atlantic Coast Line Railroad were not "made or imposed" by authority of the State of Florida, and that the Interstate Commerce Commission was without power to regulate and fix such rates until the State authority had acted thereon.

V.

The Order of the Interstate Commerce Commission was Made Without Sufficient Evidence to Support its Finding that the Florida Intrastate log Rates Discriminate Against Interstate Commerce as a Whole.

We have undertaken to show that the proceeding before the Commission was not such as is authorized by Subsection 4 of Section 13, and that the Commission did not try and determine the question as to whether the intrastate rates on logs throughout the State of Florida discriminate against interstate commerce as a whole. But even should it be held that the proceeding was such as is contemplated by Subsection 4, and that there was the full hearing which the statute contemplates, we submit that there is a total absence of substantial evidence to sustain a finding that the Florida intrastate log rates discriminate against interstate commerce as a whole.

In the Wisconsin case, *supra,* this Court held that the power of the Interstate Commerce Commission to regulate intrastate rates "should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." What evidence was there before the Commission of "real

discrimination against, and obstruction to, interstate commerce"? The Commission had fixed no "general level" of interstate rates on logs. We have already seen that there was no evidence showing or tending to show that the Florida intrastate log rates were unremunerative and therefore cast a burden on interstate commerce, in that interstate rates must be so high as to absorb a loss resulting from the intrastate rates. On the contrary, the only evidence in the record established that the intrastate rates produced a net profit.

As we have seen, the complainant offered no evidence to show that the intrastate rates were too low, but, on the contrary, sought to have their application extended to points in Georgia. Such evidence as does appear on whether the rates were remunerative, was in the nature of two cost studies, one offered by the Atlantic Coast Line Railroad to show that while the rates produced a net profit they were two low for general application and it showed a profit of only $1.34 per car (R. 796). The other was offered by the Florida Railroad Commission in an effort to show that the figures of the Atlantic Coast Line Railroad were incorrect and this study shows a net revenue of $5.85 per car (R. 797). Even this evidence was held by the Commission to be without value in showing the cost of transporting logs throughout Florida (R. 797) and therefore, in accordance with the Commission's holding, there was no evidence on the subject of whether the rates were remunerative.

(a) MERE DISPARITY IN RATES NOT SUFFICIENT TO ESTABLISH DISCRIMINATION AGAINST INTERSTATE COMMERCE AS A WHOLE.

Can it be said that particular intrastate rates on a given commodity, which do not discriminate against persons, localities, or particular traffic in interstate commerce and which produce a net profit to the carrier, discriminate against interstate commerce as a whole, within the purview of Subsection 4 of Section 13, because of a mere disparity between the intrastate rates and certain interstate rates on the same or other commodities where there is no showing as to revenue produced by either? It is conceivable in the absence of any showing as to whether the intrastate rate was remunerative, a comparison with other rates might afford some evidence from which the deduction might be made that same was not remunerative. In such case, however, there would necessarily have to be a showing that the rates with which comparison is made are applied under substantially similar circumstances and conditions.

The Court has repeatedly held that a mere disparity in rates is not alone sufficient to establish unreasonableness. In the case of *Smyth* v. *Ames,* 169 U. S. 466, the Court said that carriers are not necessarily bound to give the same rates to the people of all the States "for the kind and amount of business, and the cost thereof are factors which determine largely the question of rates and these vary in the several States. The volume of business in one State may be greater per mile, while

the cost of construction and maintenance is less. Hence, to enforce the same rates in both States might result in one (in) great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two States, are of little value, unless all of the elements that enter into the problem are presented."

There is no evidence in this record to establish the volume of traffic moving under the rates with which comparison is made nor the cost of construction and maintenance over roads operating such rates. In *L. & N.* v. *United States,* 238 U. S. 1, this Court dealt at length with the value of rate comparisons and pointed out that the mere comparison between rates does not necessarily tend to establish the reasonableness of either. The Court held, however, after allowing for dissimilarity in conditions which might exist on different roads the comparison of other rates might be taken as some evidence of the reasonableness of the rate in question. Here, however, it was not a question of the reasonableness of the Florida intrastate log rates because the rate-making power as to such rates was not vested in the Interstate Commerce Commission unless and until it could find that such rates constituted a substantial burden on interstate commerce. If the question were one of discrimination as between persons and localities, the disparity of rates would be substantial evidence thereof if a similarity of transportation conditions were shown because both rates might be reasonable and yet be discriminatory. *U. S.* v. *Illinois*

Central R. R. Co., 263 U. S. 515. While the Florida intrastate log rates were compared with certain other rates on logs and on other commodities, there was a total absence of evidence showing or tending to show similarity of conditions and circumstances of the transportation. On the contrary it was shown that the log traffic in Florida moved largely in trainloads (R. 472, 477, 493, 514, 797), whereas the traffic to which the rates apply that were compared with the Florida intrastate log rates, moves generally in single carloads (R. 493, 494). It is true that the Commission found that "whether the aforesaid rates pertained to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions." We submit, however, that this finding was perfunctorily made and is not only without any support in the evidence, but is directly contrary to all the evidence. The evidence shows, without contradiction, that the transportation of logs in North Florida, the only portion of Florida as to which there was any evidence, is generally in trainloads (R. 472, 477, 514, 515, 797), whereas the transportation of logs to which the interstate rates, with which comparison was made, apply, is generally in single carloads (R. 493, 494). There was no evidence as to the transportation conditions under which logs were transported in central and south Florida and, in fact, as stated by both the Interstate Commerce

Commission and the Court below, the evidence was confined almost wholly to north Florida.

This situation presents a striking illustration of the wisdom of the rule that mere rate comparisons, without a showing as to transportation conditions, are not persuasive. There was a complete showing as to conditions of transportation service under the intrastate Florida rates applying in north Florida and it appeared that the movement was in trainloads over lines having practically no other traffic and could therefore be performed at minimum cost (R. 476, 515). The order of the Commission, however, requires the intrastate rates in central and south Florida to be increased because they burden interstate commerce and does so in the absence of any evidence as to the conditions of transportation and by mere comparison with certain other rates as to which there is likewise a total absence of evidence establishing the transportation conditions under which such rates apply.

It must be kept in mind that the power of the Interstate Commerce Commission to increase intrastate rates, in order to remove discrimination against interstate commerce as a whole, arises only by implication, by reason of the "dovetail relation" between Subsection 4 of Section 13 and Section 15a. As stated by the Court in the Wisconsin case, Section 15a in itself confers no power on the Commission to deal with the intrastate rates. It does, however, impose upon the Commission the duty "to initiate, modify, establish or adjust" rates "in the exercise of the power to prescribe

just and reasonable rates" so that "carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will * * * earn an aggregate net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carrier held for and used in the service of transportation." In other words, the duty of the Commission under Section 15a is to maintain the revenues of the carriers, and where necessary to performance of this duty it is authorized, by Subsection 4 of Section 13, to increase intrastate rates. The duty imposed being to maintain revenues, if intrastate rates are to be regulated by the Interstate Commerce Commission in performance of this duty they are to be regulated only for the purpose of maintaining revenues. The discrimination against interstate commerce as a whole, by an intrastate rate which can be removed by the Interstate Commerce Commission under those sections, must therefore be a discrimination against or burden upon the general revenue of the carriers. In this view of the matter a mere disparity of rates is not sufficient to establish the discrimination because the question is not one of rates but of revenues. Disparity in rates may establish discrimination as between persons, localities and particular traffic in interstate commerce, but we submit cannot establish discrimination as to carriers' revenue.

The Interstate Commerce Commission may establish interstate rates on a given commodity to and from

border points and may fix the intrastate rates to and from such border points to remove discrimination against persons and localities in interstate commerce. But we submit that in such a proceeding the Commission is without power to fix other rates within the State on the same commodity on the same level solely because of the disparity between such other rates and the rates fixed by it to and from border points.

(b) THERE WAS NO EVIDENCE BEFORE THE COMMISSION TO ESTABLISH THAT THE INCREASE IN THE FLORIDA LOG RATES WOULD RESULT IN INCREASED REVENUE.

If the Florida intrastate log rates are to be increased because they create a burden on interstate commerce it should only be done on a showing that the increased rates prescribed by the Interstate Commerce Commission will remove the burden by producing a greater revenue. It has long been recognized that often times a lower rate will produce a greater revenue than a higher one, because a rate low enough to move the traffic in volume, if it produced only slight net profit per unit of transportation, will result in greater net revenue than a higher rate on which a similar volume of traffic will move. This has been recognized by this Court, as well as the Interstate Commerce Commission. In the Wisconsin case, *supra,* this Court, after sustaining the order of the Interstate Commerce Commission requiring an increase in the Wisconsin intrastate passenger fares, said:

> "It may well turn out that the effect of a general order increasing all rates, like the one at bar,

> will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception."

There is no such saving clause in the order in this case as that referred to by the Court in the above quotation, but reference is here made to the language of the Court not for the purpose of calling attention to this omission but to call attention to the recognition by the Court that the increased rates might discourage traffic and hence reduce revenues.

The Interstate Commerce Commission has itself always recognized that reduced rates may result in increased revenue. It was upon this theory that the Commission ordered a general ten per cent reduction in rates in *Reduced Rates 1922,* 68 I. C. C. 676, although the carriers were shown at the time to be earning less than the amount fixed by the Commission as a fair return. The Commission there said (p. 732):

> "High rates do not necessarily mean high revenue for, if the public cannot or will not ship in normal volume, less revenue may result than from lower rates."

In the recent *Florida Fertilizer Case,* 151 I. C. C. 602, the Commission, in refusing to order an increase in the Florida intrastate rates on fertilizer, said:

> "Furtheremore, it is not certain that if the Florida intrastate rates were increased to the in-

terstate level, additional revenue would accrue to the carriers, for if the prophesies of the interior plants and of the Florida commission are justified, practically all shipments would be made from the ports with the result that the total charges would probably be no greater than they now are."

The same predictions were made by the Florida log shippers and the Florida Commission with reference to the log rates, that is that an increase in the rates would destroy the traffic and reduce the revenues therefrom (R. 422-424; 427-429; 431,433, 533, 527).

There is no possibility of reconciling the Commission's decision in the Fertilizer case, just referred to, and the case at Bar, but we realize that the mere fact that the finding of the Commission in the case under attack is inconsistent with its holding in other cases, is not sufficient to invalidate its order. However, the Fertilizer case does establish the recognition by the Commission of the fact that an increase in the rates may produce less revenue. In the instant case the Commission made no finding as to the probable movement of traffic on the increased rates but did refer to the fact that the Florida interests predicted that mills would have to be moved from the ports to the woods, which, of course, meant the loss of the log traffic to the Atlantic Coast Line Railroad. We therefore submit that the mere showing that the intrastate rates were lower than certain other rates is not sufficient evidence that such rates constitute a burden on interstate commerce.

VI.

It is not Sufficient that a Finding of the Interstate Commerce Commission that Intrastate Rates Discriminate Against Interstate Commerce be Supported by Substantial Evidence Only, as in Cases Involving Interstate Rates, but such Finding Must be in Accord with the Preponderance of the Evidence.

So far as we have been able to find this Court has not thus far been called upon to determine the character of evidence required to support a finding by the Interstate Commerce Commission that intrastate rates discriminate against interstate commerce. In the cases that have been before the Court the fact of discrimination has apparently been unquestioned or established by the overwhelming weight of the evidence and the questions contested have been with reference to the interpretation and application of the law.

In the Shreveport case, 234 U. S. 342, where the Court upheld the power of the Interstate Commerce Commission to fix intrastate rates in order to remove discrimination against persons and localities, it is said (p. 346):

> "It is undisputed that the difference was substantial, and injuriously affecting the commerce of Shreveport."

It will therefore be seen that there no question was raised as to the fact of discrimination, that fact being admitted. In the Wisconsin case, *supra,* it was shown without contradiction that the maintenance of the in-

trastate rates at 2 cents per mile would reduce the carriers' revenue $6,000,000 below what it would be under intrastate rates *on the general level prescribed for interstate rates* and both the Commission and the Court held that this constituted discrimination against interstate commerce. Here again there was apparently no question as to the facts, but the question was as to the power of the Commission. The same seems to have been true in the case of *New York* v. *United States,* 257 U. S. 592, where the evidence showed a difference in revenue of $12,000,000 under the intrastate rates from the revenue that would have accrued under *the level fixed by the Interstate Commerce Commission* for all interstate rates. This would appear, therefore, to be the first time that the Court has been directly called upon to determine the character of evidence necessary to sustain the finding of the Commission that intrastate rates discriminate against interstate commerce.

While the Court has not directly passed upon the question as to the character of evidence, it has indicated that the rule should be different from that which the Court has established for application to cases wherein the Interstate Commerce Commission has fixed interstate rates. In the last mentioned cases the Court has held that the determination of questions of facts is by law imposed upon the Commission and that the Court will review the testimony only to determine whether the findings of fact made by the Commission are supported by sufficient evidence to save

the Commission's finding thereof from being arbitrary action. In *I. C. C.* v. *U. P.*, 222 U. S. 541, the Court held (Syllabus No. 1):

> "The courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

Again in *Seaboard Air Line* v. *U. S.*, 254 U. S. 257, the Court said that the findings of fact upon questions within the jurisdiction of the Commission "can be disturbed by judicial decree only in cases where action is arbitrary or transcends legitimate bounds of their authority" (Citing cases).

While this Court has apparently not been called upon to determine the character of evidence required to support a finding by the Interstate Commerce Commission that intrastate rates or action discriminate against interstate commerce, yet the Court has used language which clearly indicates that where the jurisdiction of the State is to be ousted the evidence must be more convincing than is required where the Court is reviewing orders of the Interstate Commerce Commission fixing interstate rates. In the recent cases of *Railroad Commission of Wisconsin* v. *Maxey*, — U. S. —, decided March 12, 1930, this Court, in discussing the failure of the Court below to render an opinion, said:

> "* * * the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown."

In the Wisconsin case, *supra,* it is also said that action of the Interstate Commerce Commission in changing state rates "should be directed to substantial disparity which operates as a real discrimination against, and obstruction to interstate commerce * * *." In other cases the Court has held that the intention of the Interstate Commerce Commission to interfere with the State function of regulating intrastate rates "is not to be presumed." *Arkansas R. R. Co.* v. *C. R. I. & P. Ry. Co.,* 274 U. S. 597.

In the Illinois Central Case, 245 U. S. 493, 510, this Court said that "it should never be held that Congress intends to supersede or suspend the exercise of reserved powers of a state, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested (Cited Cases). This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State rate or statute otherwise valid, unless, and except so far as it conforms to a high standard of certainty."

It will thus be seen that this Court has held that before the Interstate Commerce Commission may supplant a State in controlling intrastate rates it must be "persuasively shown" that the State rates constitute "a real discrimination against, and obstruction to interstate commerce * * *." The reason for applying a different rule as to the character of evidence required to justify interference with intrastate rates from that applied where the Commission is fixing interstate

rates, would seem to be obvious. When dealing with interstate matters committed to its jurisdiction the Commission is acting as the agency of Congress in controlling matters which the Constitution expressly commits to the Federal Government. The Commission is therefore, in such cases, acting as an administrative body and its findings can only be set aside when they are so wanting in support by any substantial evidence as to constitute arbitrary action. When the Interstate Commerce Commission comes to deal with intrastate rates, however, it is exercising a jurisdiction which depends upon the fact of discrimination against or burden upon interstate commerce and in such case we submit that its action must be supported by the preponderance of evidence. We find much support for this view in the concurring opinion of Circuit Judge Batts, in the case of *Eastern Texas Railroad Company, et al.*, v. *Railroad Commission of Texas, et al.*, 242 Fed. 300-307, where it is said:

> "The Supreme Court has held that the Commission may determine what is a reasonable interstate rate, and what rate must be charged on intrastate business to prevent a discrimination when both rates are in use. But the authority of the Interstate Commerce Commission with reference to intrastate rates is purely incidental and remedial. The qualities of such an order are radically different from those of an order resulting from the exercise of the legislative function involved in rate-making. To hold that it may, under any circumstances, regulate a state rate, is to carry the rules

if interpretation to the extreme limit, in view of the proviso in the first section of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, Comp. St. 1916, 8563). It may be held that it has the power to make such orders affecting intrastate rates as are necessary to prevent discrimination; certainly, the authority will not go beyond the necessity. When the Interstate Commerce Commission acts with reference to such a matter, it makes, or should make, the same character of investigation and the same character of determination that would be made by a court if a carrier charging the intrastate and the interstate rates were prosecuted for a violation of the Interstate Commerce Commission Act. Its action would be more nearly judicial than legislative. Whenever such an order is under consideration by a court, the court would have to determine whether the jurisdiction of the Interstate Commerce Commission had been exceeded; and it would doubtless decline to apply the same rule with reference to the conclusiveness of the action of the Interstate Commerce Commission that obtains when that body is, in the exercise of its established legislative authority, making rates. It would not permit the Interstate Commerce Commission to conclusively determine its jurisdiction by determining the fact of the discrimination upon which its jurisdiction would depend."

We submit that the foregoing states the correct rule and that the action of the Interstate Commerce Commission in finding the fact of discrimination against interstate commerce by intrastate rates is "more near-

ly judicial than legislative," and that "the same rule with reference to the conclusiveness of the action of the Interstate Commerce Commission that obtains when that body is, in the exercise of its established legislative authority, making rates" should not be applied.

In fixing interstate rates the Commission is exercising a legislative function, while in determining the facts necessary to its jurisdiction over intrastate rates, it is performing a judicial function and the courts will review the facts to determine the question of jurisdiction and such determination by either the Commission or the Court, like any other judicial determination, should be supported by a preponderance of the evidence.

The power of the Interstate Commerce Commission to fix intrastate rates because same cast a burden upon or discriminate against interstate commerce generally is found only by construction and implication. It involves an invasion of the powers otherwise reserved to the States. We submit that only in a clear case of necessity should such power be sustained by this Court and that it should not be sustained where the finding as to discrimination is supported by only such evidence as prevents same from being arbitrary. On the contrary, protection of the rights of the States require that they should be divested of control over their domestic rates only where the Court finds a preponderance of evidence establishes a clear necessity for such action in order to protect interstate commerce. There can be no question that the finding of the Commission here fails to

find support by a preponderance of evidence and the order should therefore be enjoined.

VII.

The Order of the Interstate Commerce Commission Constitutes an Act in Contravention of the Constitution of the United States.

All authority of the Federal Government to regulate intrastate commerce under the Constitution is derived from Section 8 thereof, which grants the power "to regulate commerce * * * among the several States." In a long line of cases the Court has held the authority to regulate commerce between the States necessarily embraces the right to control "in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." Shreveport Case, 234 U. S. 342 (351), and cases cited therein. In the case just cited it was held that the proper regulation of interstate commerce necessarily embraced the power to remove discrimination against shippers and localities in interstate commerce caused by intrastate rates fixed by State authority. In Railroad Commission of Wisconsin, *supra,* it was held that in order to maintain an adequate transportation system for interstate commerce Congress could "re-

strain undue limitation of earning power of the interstate commerce system in doing such work."

It was said by the Court below (R. 46):

> "No attack has been made before us upon the constitutionality of the enactment. Such an attack would probably be sufficiently met by what was said in the suit of Wisconsin Railroad Commission v. C. B. & Q. R. R. Co., 257 U. S. 563."

It is true that no attack was made upon the constitutionality of the enactment, but in the original and supplemental bills it was alleged that the order of the Commission was in contravention of the Constitution of the United States and this point was insisted upon throughout. We do not question the constitutionality of Federal action fixing intrastate rates where it is established that such rates discriminate against interstate commerce or cast a burden thereon. We do insist, however, that the Constitution vests no power in the Federal Government to regulate intrastate rates in the absence of a showing of discrimination against persons and localities in interstate commerce, or a showing that such rates constitute a burden on interstate commerce. It is submitted that under the principles announced in the Wisconsin case, the scope of the Commission's order cannot be sustained on the ground that the intrastate traffic discriminates against persons and localities in interstate commerce. It is further submitted that intrastate rates, which do not discriminate against persons and localities in interstate commerce, cannot be regulated by Federal power solely because of dis-

parity between such rates and certain other interstate rates because there does not exist necessity of regulating those rates in order to protect and preserve the instrumentalities of interstate commerce.

As stated by the principal witness for the complainant, the proceeding before the Interstate Commerce Commission was "not a revenue case" (R. 417). No attack was made on the Florida intrastate rates as being too low. The State of Florida had not "made or imposed" such rates. The Interstate Commerce Commission had not fixed the general level of interstate log rates, nor did it require the intrastate rates in the complaining State of Georgia, or any other neighboring States, to be increased to the level prescribed for Florida. The rates in those States not only were on a lower level than the rates in Florida but the proper authorities of those States are left free to further reduce them. The Florida log rates throughout the length and breadth of the State are not only prescribed on a higher level than obtain in neighboring States, but all power of the State of Florida to reduce or increase any of them is ended. The record establishes that the transportation of logs is overwhelmingly in intrastate movement (R. 502). This necessarily results from the fact that the transportation of logs is usually for short hauls, not to exceed 170 miles, because of the fact that there is so much waste resulting from the manufacture of the logs into lumber that it is uneconomical to pay transportation charges for long hauls thereon. The log traffic within Florida is shown to be heavy and the

continued existence of plants costing many millions and of the communities surrounding them is shown to be dependent upon the continuance of the intrastate rates upon the level voluntarily maintained by the Atlantic Coast Line Railroad at the time of the hearing. On the other hand, it is shown without contradiction that there was practically no interstate movement and that no interstate movement of comparable proportions with the intrastate traffic could result under the rates prescribed. Will this Court hold that by construction and implication the Interstate Commerce Commission is empowered, in such a case as this, to set aside all authority and control of a sovereign State over rates and charges on which its economic prosperity may depend? Does this not constitute invasion of the rights and powers reserved to the State by the Constitution and reaffirmed by the very Congressional act which created the Interstate Commerce Commission and gave to it all of the powers which it enjoys?

Unless the regulation of the rates on logs between points in Central and Southern Florida was shown to be necessary to the efficient control of interstate commerce, or to the maintenance of an adequate transportation system for interstate commerce, the Constitution grants no power over said rates to the Federal Government. We have elsewhere undertaken to show that there was no substantial evidence submitted to the Interstate Commerce Commission to establish the necessity of increasing the rates in Central and Southern Florida in order to maintain an efficient transpor-

tation system, and that there was no substantial evidence that the increase in such rates would result in any greater return to the carrier engaged in interstate commerce. In the absence of such evidence the order of the Commission was in contravention of the Constitution of the United States. To sustain such an order not only must there be a preponderance of evidence but that evidence must support a finding of a substantial discrimination against or burden upon interstate commerce. In *Lawrence* v. *St. L. S. F. Ry. Co.*, 274 U. S. 588, the Court stated that while the Federal power is paramount it should not be exerted "unnecessarily, hastily or harshly." We submit that the Federal power does not exist unless and until its exercise becomes *necessary,* that is, necessary to the proper control over interstate commerce and the maintenance of the facilities therefor. Until such necessity is established by a preponderance of evidence there is no such power in the Federal Government. We submit that there is an absolute want of any evidence to show such a necessity and that therefore the order of the Interstate Commerce Commission was in contravention of the provisions of the Constitution of the United States.

VIII.

The Action of the Interstate Commerce Commission Under the Circumstances of this case Constitute an Unwarranted Exercise of Federal Power and Unnecessary, Hasty and Harsh Interference with the Power of the State.

Unless the order of the Interstate Commerce Commission is enjoined and set aside, the rates on logs between all points "within and throughout the entire state of Florida, without exception" are not only removed from all control by the State of Florida but they are "frozen" in that they can be neither more nor less than the rates which the Commission prescribed for present application between north Florida and southern Georgia. Therefore, as to one of the principal national resources of the State, Florida is deprived of all control over the transportation thereof within its own borders. The transportation of logs is overwhelmingly intrastate in character and yet the Federal authority is exercised in negation of the State's control. This drastic invasion of the rights and powers of a sovereign State over its domestic concerns finds it sole justification in a finding by the Interstate Commerce Commission that the rates involved discriminate against interstate commerce as a whole. This finding was made in a case in which the principal, if not the sole issue, was one of discrimination as between persons and localities, and the question as to whether the rates throughout Florida discriminated against interstate commerce as

a whole was not tried out by the parties, as the complainant offered no evidence thereon.

The jurisdiction of the Interstate Commerce Commission over intrastate rates to remove discrimination against interstate commerce generally is conferred only by interpretation which carries "the rules of interpretation to the extreme limit." Such evidence as was offered to show discrimination against interstate commerce generally was not "persuasive" of any "real discrimination against, and obstruction to interstate commerce." The fact is that in performing its function of prescribing interstate rates and of removing discrimination between persons and localities, the Commission had presented to it certain intrastate rates which it thought were improper and should be changed. It thereupon cast about for some basis of exercising jurisdiction to change that which it thought to be wrong, and seized upon the allegation in the bill that such intrastate rates "cause undue and unreasonable and unjust discrimination against interstate commerce, in violation of section 13 of the interstate commerce act," and proceeded to fix the intrastate rates because, as the Commission said, "it is manifest, we believe, that the intrastate rates assailed, which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory."

Appellant respectfully submits that the action of the Interstate Commerce Commission under the circumstances above recited was an unwarranted exercise of the Federal power, was unnecessary, hasty and harsh,

and is contrary to the provisions of the Federal Constitution and of the Interstate Commerce Act. In such a case as this the Court should have intervened to protect the State of Florida from an unwarranted intrusion by an agency of the Federal Government into its domestic affairs.

We further submit that this Court has made it clear in numerous cases that interference by the Interstate Commerce Commission with intrastate rates could be sustained only where the discrimination was real and constituted a real obstruction to interstate commerce, and that this Court has not contemplated that the power which it gave to the Commission by construction and interpretation would be exercised in any such case as this.

We further submit that "the demands of comity and courtesy" which this Court has said it is important to defer to, have been violated. The Interstate Commerce Commission, without giving the Florida Commission an opportunity to act, has fixed a hard and fast schedule of rates on logs for application throughout the State of Florida on a level higher than obtains in neighboring States, which neighboring States are left free to make such changes in the rates within their borders as they deem necessary and lawful. Florida alone is divested of all authority over its domestic log rates and Florida shippers compelled to pay rates prescribed by a Federal tribunal which are higher than are charged to shippers in Georgia, South Carolina and other neighboring States.

We, therefore, submit that we have here a plain case of unwarranted and unlawful interference with State authority and that the lower court should have granted the relief prayed for in the bill and supplemental bill and should have permanently enjoined the order of the Interstate Commerce Commission.

CONCLUSION.

We submit that if the order of the Commission in this case can be sustained then all authority of the State over its domestic rates is at an end. The Commission here, in a case instituted for and on behalf of shippers and directed primarily to the removal of discrimination against persons and localities in interstate commerce, has ordered an increase in rates which cannot be held to discriminate against such persons and localities and has done so under the guise of its duties to maintain the revenue of the carriers upon evidence which consisted entirely of a showing of disparity in rates without a showing of operating conditions. The power of the Commission to change intrastate rates because same are so low as to prevent the Commission from performing its duties under Section 15a is not directly granted but is found only by interpretation. This Court has not heretofore sustained such power except in cases where rates imposed by State authority were not permitted to be increased in accord with general orders of the Interstate Commerce Commission, made in order to carry out the intent of Section 15a,

and applicable to all rates. If, on the complaint of a shipper and in cases where the Interstate Commerce Commission has fixed no general level of interstate rates, the Commission can deal with particular intrastate rates and order them changed, there is nothing left of State power over intrastate rates. It is, therefore, respectfully submitted that the order of the Interstate Commerce Commission goes beyond the powers vested in the Commission and unnecessarily, and without warrant of law, invades the rights of the States and that same must be enjoined.

Respectfully submitted,

J. V. NORMAN,
Counsel for Wilson Lumber Company, Appellant.

Inter-Southern Building,
Louisville, Ky.

April 9, 1930.

APPENDIX.

STATUTES RELIED UPON.

The Interstate Commerce Act, (41 Stat. L., 474):

Section 1:

(1) That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

(c) The transmission of intelligence by wire or wireless;—

from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid:

(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States, as aforesaid; or

* * * *

(5):

"All charges made for any service rendered or to be rendered in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Section 3 (1):

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 13 (1):

"That any person, firm, corporation, company or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of laws thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matter complained of in such manner and by such means as it shall deem proper."

Section 13 (2):

"* * * the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning

which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders of the payment of money."

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also

authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15 (1):

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or col-

lected, by any common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *."

Section 15a (2):

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for

and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable, and to prescribe different rates for different sections of the country."

Section 15a (3):

"The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided,* That during the two years beginning March 1, 1920, the Commission shall take as such a fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account."

The District Court Jurisdiction Act (C. 32, 38 Stat. L., 219):

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hun-

dred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment, the term 'destination' shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and

processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operations, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit; *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges, concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for

the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed

pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the later to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen. * * *."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

STATE OF FLORIDA AND A. S. WELLS, E. S. MATHEWS, ET AL
Appellants,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.
NO. 16

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY,
Appellants,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.
NO. 17

WILSON LUMBER COMPANY OF FLORIDA,
Appellant,
vs.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.
NO. 18

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR ATLANTIC COAST LINE RAILROAD CO.

F. B. GRIER,
CARL H. DAVIS,
W. E. KAY,
ROBERT C. ALSTON,
Counsel for Atlantic Coast Line Railroad Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

STATE OF FLORIDA AND A. S. WELLS, E. S. MATHEWS, ET AL *Appellants,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 493
BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY, *Appellants,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 494
WILSON LUMBER COMPANY OF FLORIDA, *Appellant,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 495

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF ON BEHALF OF
ATLANTIC COAST LINE RAILROAD COMPANY

PART ONE

STATEMENT OF THE CASE

The Atlantic Coast Line Railroad Company was the defendant in the proceeding before the Interstate Commerce Commission out of which these appeals grew (R. 16*). It is a carrier by railroad, having about 5100 miles of line, about 2200 of which are within the State of Florida. It does business as a common carrier by railroad over its own lines in the States of Virginia, North Carolina, South Carolina, Georgia, Florida and Alabama (R. 154). It intervened in this litigation (R. 149).

SUBJECT MATTER OF THE LITIGATION

The subject matter of the litigation is an order of the Interstate Commerce Commission (R. 26) fixing rates for intrastate transportation in Florida of logs moving over the lines of the Atlantic Coast Line Railroad Company in Florida for distances up to 170 miles. This order was issued on the 2nd day of August, 1928, effective on or before October 10, 1928 (R. 26). For the Commission's report see page 16 of record.† The effective date of this order was moved forward by orders of the Commission until December 10, 1928 (R. 10).

The petitioner in the proceeding before the Interstate Commission was the Georgia Public Service Commission. The

*Vol. 1 of Record ends with page 544;
Vol. 2 contains pages 545 through 1031.

†Georgia Public Service Commission vs. A. C. L. R. R., 146 I. C. C. 717.

order of the Interstate Commission was twice amended. The first was on the 5th of February, 1929 (R. 90). The effect of this amendment was to make it clear that the order did not apply to ash, gum, hickory, oak, pine and cypress logs not over six feet in length. These are sometimes referred to as short logs. The second amendment was on the 7th day of February, 1929 (R. 90). This substituted for the words "within the State of Florida" the following: "Within and throughout the entire State of Florida, without exception." This last amendment was made for the purpose of removing some lack of clarity which was thought to exist in the order by the United States District Court for the Northern District of Georgia, which is pointed out in paragraph 4 of the opinion rendered on the 17th day of January, 1929; which opinion begins at page 44 of the record, and the 4th paragraph begins at page 50. In its aforementioned report the Commission found as follows (R. 16, 17):

> "1. Interstate rates on logs, except walnut, cherry, and cedar, in carloads, from Florida points north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, Fla., to destinations in Georgia found unreasonable. Reasonable rates prescribed.
>
> 2. Florida intrastate rates on logs, except cedar, in carloads, found to be unduly preferential of shippers in intrastate commerce, unduly prejudicial to shippers in interstate commerce, and unjustly discriminatory against interstate commerce. Rates prescribed which will remove such preference, prejudice and discrimination."

These findings are somewhat more elaborated in the body of the report, beginning at page 25.

The effect of the report and order was to fix interstate rates on logs (by the word "logs" we exclude short logs above

referred to and include the kind of logs mentioned in the above quotation from the Commission's report) found by the Commission to be reasonable, "from points on its lines in the State of Florida north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs to destinations on its lines in the State of Georgia," and to hold that the existing rates for intrastate movement of logs over the Atlantic Coast Line Railroad in Florida, for distances not exceeding 170 miles, were unreasonable and unduly preferential to shippers in intrastate commerce, unduly prejudicial to shippers in interstate commerce, and unjustly discriminatory against interstate commerce, and to prescribe rates removing such preference, prejudice and discrimination.

Three bills were filed in the United States District Court for the Northern District of Georgia seeking to restrain and enjoin the operation of the above mentioned order. One of them was filed by the State of Florida and the three members of the Florida Railroad Commission. (A. S. Wells, E. S. Mathews and Mamie G. Eaton) (R. 1); another by Brooks-Scanlon Corporation, Wilson Cypress Company, Cummer Cypress Company (R. 870); and another by Wilson Lumber Company of Florida (R. 960). These bills were consolidated for the purpose of trial (R. 900). The case thus consolidated was heard, and on January 17, 1929, an opinion was rendered by the United States District Court for the Northern District of Georgia (presided over by three judges—Mr. Circuit Judge Walker, Mr. District Judge Sibley, and Mr. District Judge Dawkins) (R. 44), and a decree was entered on the same date (R. 52) denying the relief prayed by the complainants and dismissing the bill. The opinion referred to in paragraph 4 thereof (R. 50) appeared to construe the

order of the Commission to be limited to shipments on the Coast Line in the State of Florida north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs. (30 Fed. 2d, 116.)

After this decree was rendered the Florida Commission issued its order of January 30, 1929 (R. 128), undertaking to declare the Interstate Commission's order to be limited to an extent as therein set out and which limitation would have made the Commission's order completely ineffective. There then followed a complicated litigation which is detailed in a motion made by the Atlantic Coast Line and is found at page 150 of the record. That litigation is now thought to be irrelevant to the questions before this Court.

After the two orders of the Interstate Commission of February 5th and February 7th, amending the Commission's original order, petitions for rehearing and supplemental bill of complaint were filed by the State of Florida and the Florida Commission (R. 52 et seq.); another by Wilson Lumber Company of Florida (R. 985); and another by Brooks-Scanlon Corporation, Wilson Cypress Company, and Cummer Cypress Company (R. 902). The motion for rehearing was allowed and rehearing had, and an opinion on the rehearing was rendered on March 22, 1929 (R. 167), (31 Fed. 2d, 580) and a decree was entered on that opinion on April 22, 1929 (R. 170). The crucial part of that decree is as follows:

> "It is, for the reasons stated in our opinion, March 22nd, 1929 (which opinion is duly filed as part of the record), ordered, adjudged and decreed that the original and supplemental bill be and the same hereby is now dismissed and the relief prayed denied."

The effect of this decree was to leave the order of the Interstate Commerce Commission, amended as hereinbefore

referred to, in full force and effect. Under this order, as we have pointed out, the Interstate Commission fixed rates for the movement of logs intrastate in Florida over the Atlantic Coast Line for distances not exceeding 170 miles, which were in excess of those previously in force for such traffic; and which rates thus fixed were intended to remove the preference, prejudice, and discrimination which the Commission had found to be worked by the Florida rates which were thus superseded. The appeals in these cases are from this last order.

The scale of Intrastate Rates condemned by the Commission is known as the Cummer scale.

It will be noticed that the intrastate rates (the Cummer scale) complained of were applicable over only the lines of the Atlantic Coast Line in Florida and for the maximum distance of 170 miles.

The corresponding rates for distances beyond 170 miles were much higher proportionately than the ones up to that maximum distance; and the rates on the same commodity over other lines of railroad in Florida for like distances were also much higher.

The Commission's report and order deal with discrimination, and the Commission found, as we have seen, that there was undue and unreasonable preference to shippers in intrastate commerce and undue prejudice to and unjust discrimination against interstate commerce.

The rates in the Cummer scale of rates, condemned by the Commission, were so low that they did not carry their fair part of the burden of the operation of the railroad, and made the carriage of the commodity involved (logs) a burden upon interstate commerce.

These are questions of fact, and we will undertake to analyze the evidence to show that the findings were made after full hearings and on ample evidence.

A SYNOPSIS OF THE ANALYSIS OF THE EVIDENCE

(1) History of Cummer Scale of Rates. *Page* 11

(2) Relationship between the Rates under the Cummer scale and the Florida-Georgia interstate scale on August 2, 1928, and the latter scale as fixed in this proceeding shows that the Cummer scale rate is less than half of the rates under either of the other scales. *Page* 14

(3) Relationship of the Cummer rates to intrastate rates on the same commodities in Georgia, shows that the Cummer scale of rates is not more than one-half of the rates prescribed by the Georgia Commission for the same commodities intrastate in Georgia.

It was this condition, called by the Georgia Commission "intolerable", which brought on the proceeding before the Interstate Commission. *Page* 17

(4) Florida Commission condemned the Cummer scale of rates.

The Florida Commission condemned the Cummer scale, when it was offered, as being too low and as being discriminatory, and as being prejudicial to commerce in all classes of freight. *Page* 19

(5) Comparison of the Cummer scale of rates between points in Florida with rates on same commodities between points in Florida and points in Georgia shows that the Cummer scale of rates is much less than one-half, often about one-third of the interstate rate from Florida to Georgia; and that a car of lumber manufactured in Valdosta or Thomasville, Ga., would be at a disadvantage of $69.00 as compared with a car

manufactured in Florida and moving a like distance from forest to mill. *Page* 22

(6) Comparison of Cummer scale with the intrastate scales in North Carolina, South Carolina, Georgia, and Alabama, and with interstate rates, shows that the Cummer scale is less than one-half of the average of the rates under those scales. *Page* 25

(7) Comparison of Cummer scale of rates with the rates on the same kind of logs moving intrastate over Florida railroads other than Atlantic Coast Line, shows that the Seaboard Air Line's rates are about twice as high. This latter road operates about 1850 miles in Florida, while the Atlantic Coast Line operates about 2200 miles. *Page* 27

The Cummer scale "is the lowest scale to be found."
(Abrams) *Page* 27
(Price) *Page* 26

(8) Like comparison with the corresponding rates on the Georgia-Southern & Florida Railway shows approximately even greater disparity than that shown by comparing the Seaboard's rates.

Various kinds of comparisons are made by the witness Potter, of the Georgia-Southern & Florida—state and interstate—showing the Cummer scale to be only one-third to one-half of other rates. *Page* 29

(9) The Central of Georgia Railway intervened and gave testimony to the "far reaching effect if the Florida rates are extended into Georgia." *Page* 30

(10) Comparison of the rates on logs under the Cummer scale with the rates on other commodities having like kind of transportation characteristics shows that the Cummer scale is only about 40 per cent. of the rate on brick; and the yield on the carriage of logs is much less than on the carriage of the same amount of cotton

seed, cotton seed hulls, clay, gravel, sand, stone, asphalt, shale, cord wood, cross ties, cement, etc.

Page 31

(11) More detailed comparison of rates on logs with brick, sand, gravel and cement shows the continued and great discrimination in favor of the log movement; and also the great discrimination against interstate commerce. For instance, the revenue on a car of logs weighing 55,000 pounds moving interstate 50 miles from Florida would be $27.50; and if the same car had moved intrastate in Florida, it would have been $11.55. *Page* 34

(11a) Comparison of percentage relationship which the Cummer scale rates on logs bear to lumber rates ordered by the I. C. C. in Meridian case, 60 I. C. C. 5. *Page* 36

(12) Extent of discrimination which will be worked by a continuance of the Cummer scale.

The amount of timber to be cut into logs and transported is measured by hundreds of millions of feet. It will require 59,529 car loads of logs to move the 250 million feet of cypress of the Wilson Cypress Company. To move the Cummer Cypress timber it would take 28,257 car loads. It will require 186,800 car loads of logs to remove more than one billion feet of logs of the Brooks-Scanlon Corporation. The Putnam Company's holdings aggregate more than a billion feet.

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(13) Undue discrimination which the Cummer scale works against the Georgia manufacturer of lumber in the markets of consumption.

If logs moved 150 miles intrastate in Florida and were manufactured into lumber and sold in a market of the Northeast, that is, from Washington, D. C., up to Portland, Maine, the Florida lumber would have an advantage of $61.50 a car as against lumber manufactured from the same logs moved the same distance to a

Georgia manufacturing point. This is more than sufficient to give the Florida manufacturer monopoly of those markets. *Page* 39

(14) The territorial extent of investigation.

The Commission investigated the condition of timber and logs and mills at many points in Florida throughout the northern part of the State, the center of the State, and quite far in the south. If the points investigated by the Commission were used as a center and circles were drawn from them with a radius of 170 miles (the maximum distance of the Cummer scale) those circles would overlap many times. *Page* 42

(15) Cost Studies.

Evidence was offered by the Atlantic Coast Line Railroad to show that the cost of an average haul from Perry and Carbur to Eastport and Milldale, left only $1.34 after deducting the cost, not including taxes and equipment rentals. The Florida Commission offered evidence that showed this item to be $5.85 per car. Neither of these cost studies dealt with the individual car load shipments. Thus the Commission had before it evidence on the question of costs. *Page* 45

(16) There is timber in the northern part of Florida available for use in Georgia.

The evidence shows that there is substantial timber in the northern part of Florida available for use by manufacturers in Georgia. Little of this is in large tracts. It shows that there is a great deal of timber in north Florida which would be available for manufacture in Georgia, except for the fact that it is owned by mill owners operating in Florida. The evidence also shows that this difference in freight rate has a substantial effect upon the market for stumpage and that the rate thus affecting the market for stumpage affects inter-

state commerce from its origin and that this continues on until the manufactured product reaches the market. *Page* 49

(17) Rates in South Florida. *Page* 53

(18) Similarity of circumstances and conditions of transportation covered by comparisons of rates. *Page* 54

It is submitted that the evidence amply sustains each finding made by the Commission; that the hearings were full; investigations were State-wide; and the conclusion reached by the Commission as to undue preference to intrastate shippers and undue prejudice and discrimination against interstate shippers and interstate commerce was necessary. There were two hearings—one at Valdosta, Georgia, beginning on October 20, 1926 (R. 399), and the other at Jacksonville, Florida, on January 18, 1927 (R. 531), twenty-six witnesses were examined and fifty-three exhibits were offered, and the case went through a long contest in the Commission and in the courts below.

ANALYSIS OF THE EVIDENCE
CUMMER SCALE OF RATES.

(1) When these proceedings were instituted before the Interstate Commerce Commission the Atlantic Coast Line Railroad Company had in effect in Florida a scale of rates for intrastate transportation of logs for distances up to 170 miles. These distances were in gradations of five miles and the rates were in gradations much longer than five miles. These rates were known as the Cummer scale. This scale is described by the Interstate Commerce Commission in its report as follows:

"On June 29, 1903, a contract was entered into between the Jacksonville & Southwestern Railroad and the

Cummer Lumber Company, controlled by the same interests, under which the former agreed to transport logs for the latter at certain specified rates for a period of 15 years. The Jacksonville & Southwestern extended from Jacksonville southwesterly to Newberry, Fla., approximately 85 miles. The mills of the Cummer Lumber Company were at Milldale, near Jacksonville. Under this contract the rates per car of 50,000 pounds were $4 for distances under 40 miles, $7 for distances from 40 to 60 miles, and $8 for distances from 60 to 90 miles, with $1 per car additional for each 10 miles over 90, the rate from the Suwanee River not to exceed $10 per car. These rates are generally referred to as the Cummer scale. Defendant acquired the properties of the Jacksonville & Southwestern in 1904 and had to assume the obligations of that company under the contract referred to. Upon its expiration in 1918 the contract was not renewed. In the meantime, on January 26, 1914, defendant entered into a similar contract with the Carpenter-O'Brien Company, the predecessor of intervenor Brooks-Scanlon Corporation, which was to continue in effect until such time as the timber in LaFayette and Perry Counties, Fla., then owned by the Carpenter-O'Brien Company, consisting of approximately 1,000,000,000 feet of pine, largely tributary to defendant's line extending from Newberry to Perry, Fla., had been transported. The contract provided for movement from points between Clara, and Perry, inclusive, to the plant of the lumber company at Eastport near Jacksonville, 142 to 166 miles, in trainloads of not less than 30 cars per day, or 60 cars every other day, Sundays and legal holidays excepted, at a rate of $12 per car, minimum 50,000 pounds, excess in proportion. It was stipulated that the contract should be subject to Federal and Florida laws and to the order of any court or commission of competent jurisdiction. Pursuant to this contract defendant filed schedules with the Florida commis-

sion extending the Cummer scale to $11 per car for distances from 110 to 130 miles, and $12 per car for distances from 130 to 150 miles. That commission refused to permit the proposed rates to become effective because they were published to apply only on train loads and were not available to all shippers. It further advised defendant that the rates themselves were too low and such as might be deemed confiscatory. The rates were republished to apply on carloads over all of defendant's Florida lines and became effective October 30, 1914. On July 5, 1916, the scale was extended so as to apply the $12 rate for distances to 160 miles. On April 30, 1919, the scale was further extended by establishing a rate $16.50 for distances to 170 miles, the latter rate including the 25 per cent general increase of June 25, 1918. These rates were established and, as modified by the subsequent general increases and reduction, have been continued by defendant for the purpose of complying with its contractual obligations and not because it considers the scale proper for general application on intrastate traffic within Florida."

(R. 19. 146 I.C.C. 717, 719.)

The contract between the Jacksonville & Southwestern Railroad Company and the Cummer Lumber Company was made "coincident with the sale of the railroad" to the Atlantic Coast Line (R. 470). When the Atlantic Coast Line tendered its freight tariff No. 3282 to the Florida Commission, carrying out the contract, to become effective on July 15, 1914, it was rejected because it applied only to train loads of a minimum of twenty-eight cars (R. 471).

It then tendered a second tariff No. 3339, to become effective October 3, 1914, and this was rejected because it contained a provision to the effect that "when two or more cars

are shipped from one station in one day by one shipper, for delivery to one consignee at one destination, these rates will be charged for an average carload weight of 50,000 pounds per car," etc. A third tariff No. 3373 was tendered, effective October 30, 1914, making the same scale applicable "for general application between points on the Atlantic Coast Line Railroad in Florida on logs, carload, per car 50,000 pounds, excess in proportion" (R. 471). This last filing was accepted by the Commission. Attention is called to Exhibit No. 15, the Commission's letter on the subject, dated the 9th of October, 1914, and Exhibit No. 16, dated August 18, 1915, which showed the disapproving manner in which the Commission allowed this filing. These exhibits will be hereinafter more fully discussed. (R. 270, 272).

This finding by the Commission is fully sustained by the witness Perrin (R. 469).

These rates are so low that the Commission has found that they were unduly preferential of shippers in intrastate commerce, unduly prejudicial to shippers in interstate commerce, and unjustly discriminatory against interstate commerce (R. 17).

THE RELATIONSHIP BETWEEN THE RATES UNDER THE CUMMER SCALE AND THE FLORIDA-GEORGIA INTERSTATE RATE SCALE ON AUGUST 2, 1928 (THE DATE OF THE REPORT), AND THE RELATIONSHIP BETWEEN THE CUMMER SCALE AND THE INTERSTATE RATES WHICH THE COMMISSION FIXED IN ITS SAID REPORT.

(2) The relationship of the rates under the Cummer scale to the Florida-Georgia interstate rates, which were in effect on August 2, 1928, and the relationship to the rates which the

Interstate Commission proposed for interstate transportation and actually established are shown at page 22 of the record and at page 721 of the official report in the 146 I.C.C. That is as follows:

Distance	*Florida-Georgia Interstate*		*Florida Intrastate*		*Proposed Interstate*	
	Rate Cents	Earnings	Rate Cents	Earnings	Rate Cents	Earnings
5 miles	2.5	$12.50	1.71	$8.85	2.5	$12.50
10 "	3	15.00	1.71	8.55	2.5	12.50
15 "	3.5	17.50	1.71	8.55	3	15.00
20 "	3.5	17.50	1.71	8.55	3	15.00
25 "	4	20.00	1.71	8.55	3.5	17.50
30 "	4	20.00	1.71	8.55	3.5	17.50
35 "	4.5	22.50	1.71	8.55	4	20.00
40 "	4.5	22.50	1.71	8.55	4	20.00
45 "	5	25.00	2.10	10.50	4.5	22.50
50 "	5	25.00	2.10	10.50	4.5	22.50
55 "	5.5	27.50	2.10	10.50	4.5	22.50
60 "	5.5	27.50	2.10	10.50	5	25.00
65 "	6	30.00	2.30	11.50	5	25.00
70 "	6	30.00	2.30	11.50	5	25.00
75 "	6.5	32.50	2.30	11.50	5.5	27.50
80 "	6.5	32.50	2.30	11.50	5.5	27.50
85 "	7	35.00	2.30	11.50	5.5	27.50
90 "	7	35.00	2.30	11.50	6	30.00
95 "	7	35.00	2.60	13.00	6	30.00
100 "	7	35.00	2.60	13.00	6	30.00
110 "	7.5	37.50	2.80	14.00	6.5	32.50
120 "	8	40.00	3.20	16.00	6.5	32.50
130 "	8.5	42.50	3.20	16.00	7	35.00
140 "	8.5	42.50	3.40	17.00	7	35.00
150 "	9	45.00	3.40	17.00	7.5	37.50
160 "	9	45.00	3.40	17.00	7.5	37.50
170 "	9.5	47.50	3.70	18.50	8	40.00

NOTE: The interstate rates which are referred to above as "proposed" are the rates established by the Commission in its order in this case (R. 27).

It must be borne in mind that this Cummer scale of rates was applicable on the lines of only the Atlantic Coast Line and for distances only 170 miles maximum and that it was not applicable to shipments of logs moving over any other road, or in part over the lines of the Atlantic Coast Line and any other road, nor was it applicable by rail and water.

It will be noticed that for a distance of 50 miles the rate applicable in interstate commerce between the two States per hundred pounds was 5 cents, while the Florida intrastate rate was 2.10 cents and the newly established interstate rates 4.5 cents. For that distance a car in interstate commerce would earn $25.00; a car in Florida intrastate commerce would earn $10.50; and a car moving under the newly established interstate rates would earn $22.50. In other words, the Florida intrastate earnings were less than half of what the earnings would have been on the proposed interstate scale.

At 75 miles the Florida-Georgia interstate rate was 6.5 cents per hundred pounds; the Florida intrastate scale (Cummer) was 2.30 cents; the Florida interstate scale as established in this report was 5.5 cents. The car earnings under the interstate scale were $32.50; under the intrastate scale $11.50; and under the newly established interstate scale $27.50.

At 100 miles the interstate scale was 7 cents and car earnings $35.00; the Cummer scale rate was 2.60 cents, and car earnings $13.00; under the newly established interstate scale the rate was 6 cents, and car earnings $30.00.

At 170 miles the interstate rate was 9.5 cents, and car earnings $47.50; the Cummer rate was 3.70 cents, and car earnings $18.50; and under the newly established interstate scale the rate was 8 cents, and car earnings $40.00.

The Commission found (R. 26) that "whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

See 146 I.C.C. 725.

RELATIONSHIP OF THE RATES UNDER THE CUMMER SCALE TO INTRASTATE RATES ON THE SAME COMMODITIES IN GEORGIA.

(3) In 1916 the Georgia carriers filed a petition with the Georgia Public Service Commission for a general revision of intrastate freight rates in Georgia. After extended hearings the Commission revised all class and commodity rates, including the rates on logs, to become effective in September, 1918. Because of war conditions the effective date of the order was indefinitely postponed. On July 14, 1921, the Georgia Commission required the carriers to submit schedules of rates for the purpose of removing existing irregularities and discrimination between points in Georgia. Extensive hearings were had under this order. In October, 1923, the Commission submitted proposed or tentative rates on logs. Criticisms on this schedule were heard by the Commission on November 26, 1923. Objections were made and considered, and the Commission entered a final order on the 15th of April, 1925, to become effective June 1, 1925. The effective date of this order was postponed to August 1, 1925. At a hearing in July, 1925, the Florida rate situation in reference to logs was brought to the attention of the Georgia Commission. Evidence was received by the Georgia Commission at that hearing from a number of witnesses to the effect that should the Georgia

Commission require the new and revised and increased rates to go into effect it would have the effect of moving industries located in Georgia to Florida "where even the present rates are much lower than the present Georgia scale" (R. 402, 403). The Georgia Commission brought this to the attention of the Atlantic Coast Line with request that its traffic officials consider extending the Florida intrastate rates complained of into the State of Georgia, and they declined to do so (R. 404). The Georgia Commission then sought relief from the situation through the Interstate Commerce Commission.

The Commission, at page 722 of its report, said (R. 22):

> "Complainant introduced exhibits showing that defendant's proposed interstate rates are higher than its intrastate log rates in various of the southeastern States, than the average of such intrastate rates, and than the combined average of its intrastate and interstate rates. Rates substantially the same as those proposed by defendant were, however, prescribed by complainant in 1925 for application within Georgia, and while complainant's order was later rescinded, its rate expert testified that the rates then prescribed were in his opinion on a reasonably low basis."

This statement is justified by the evidence of the witness Price, Rate Expert of the Georgia Commission (R. 418).

The Georgia rates, proposed in 1925 and suspended because of this Florida situation, are shown in Exhibit No. 24 (R. 291).

The rates provided by the Cummer scale are not more than one-half of the rates prescribed by the Georgia Commission. The Georgia Commission in suspending the rates submitted to the carriers on April 15, 1925, wrote a letter to the carriers saying:

"The evidence submitted at the rehearing reveals, what is in the opinion of the Commission, an intolerable situation, as regards the rates in Florida, as compared with the interstate rates between Georgia and Florida, and the effect on this situation of the suspended rates authorized in the Commission's order."

See evidence of the witness Perrin (R. 480).

FLORIDA COMMISSION CONDEMNED THE CUMMER SCALE OF RATES.

(4) The Interstate Commission finds in its report as follows (R. 20):

"That Commission (Florida Commission) refused to permit the proposed rates to become effective because they were published to apply only on train loads and were not available to all shippers. It further advised defendant that the rates themselves were too low and such as might be deemed confiscatory."

See 146 I.C.C. 720.

This is supported by Exhibit No. 15 (R. 270, 271), which is a letter from J. H. Tench, Rate Expert of the Florida Commission and is addressed to the Freight Traffic Manager of the Atlantic Coast Line Railroad Company, and is dated October 9, 1912. The letter acknowledges receipt of Atlantic Coast Line freight tariff No. 3339, effective October 3, 1914, carrying rates on logs in car loads between stations on the Atlantic Coast Line Railroad up to a distance of 150 miles. The Commission required the striking of one of the provisions of the tariff and thus made the tariff apply on car loads rather than on train loads of logs, and then said:

"The Commissioners wish it distinctly understood that this approval extends only to the method of stating

the rates in this tariff and not to the rates themselves, and that in their opinion they are too low. The rates carried in this tariff are such as might be deemed confiscatory, and there is little doubt in the minds of the Commissioners if they were to order such a scale of rates that your company would contend that they amounted to confiscation and the taking of your property without due process of law."

"To make such a scale of rates for the movement of logs in this State reduces the power of the Atlantic Coast Line R. R. Company to make other just and reasonable rates to be charged on all classes of freights that the public may be interested in. It also reduces the power of this Commission upon complaint and hearing hereafter to prescribe what might be just and reasonable rates to be charged for other freights when the entire revenues of the Atlantic Coast Line Railroad Company are to be taken into consideration. They amount practically to a discrimination against other classes of freight and all other people engaged in different lines of business."

"The Commissioners regret that you have seen fit to publish these extremely low rates. There is no question but that the time will come when these barely remunerative rates will be used as the basis for opposition to the reduction of other rates, where perhaps a reduction might not only be justifiable but necessary, and therefore the Commissioners wish to impress upon you the fact that the low rates carried in your Freight Tariff No. 3339 were not only not ordered into effect or suggested by them, but were published by you in direct opposition to their advice and suggestions."

It is also supported by Exhibit No. 16, which is a letter dated August 15, 1915, and signed by Honorable R. Hudson Burr, Chairman of the Florida Commission (R. 272). Some of the statements in this letter are:

"Beg to advise that the Commissioners thoroughly agree with you that this rate is too low. * * * To be perfectly frank, in the opinion of the Commissioners, this was a preferential rate, made in the interest of the Cummer Lumber Company.

The present Class P rates in this state, which apply on lumber, logs and wood, were put into effect by the Commissioners after an extended investigation, not only of the lumber industry in this state and adjoining territory, but also of the financial condition of the carriers, and we are convinced that these rates are just and reasonable as applicable to this traffic. If you will compare the rates on lumber in this state with the rates on lumber in Georgia, Alabama, South Carolina, North Carolina, Virginia and Tennessee, you will find that our rates are lower than in any of these states, in which states the conditions are practically the same, except in that in each state mentioned the density of population is greater than it is in Florida."

We thus see that the Cummer scale of rates was condemned by the Florida Commission from the beginning as being a burden on other classes of traffic in which the public was interested. The classes of traffic to which the Florida Commission referred as being burdened by this scale of rates were not confined to intrastate matters. The Commission particularly stated that the burden would fall upon "all classes of freight that the public may be interested in." Thus, in the beginning the Florida Commission condemned these rates because they would produce the result which the Interstate Commerce Commission has found that they have produced, to-wit, a discrimination against interstate commerce, and as well a discrimination against shippers and places, and they give undue preference or advantage to a particular description of traffic.

The history of the Cummer scale of rates is given by the witness J. W. Perrin (R. 469). Mr. Perrin was then Assistant Freight Traffic Manager of the Atlantic Coast Line. The rates originated in contract on July 28, 1904, when the Atlantic Coast Line acquired the property of the Jacksonville & Southwestern Railroad Company extending from Jacksonville, Florida, in a southwesterly direction to Newberry, Florida. There was common ownership between the Jacksonville and Southwestern Railroad Company and the Cummer Lumber Company, and at the time of the purchase by the Atlantic Coast Line there was a contract between the Cummer Lumber Company and the Jacksonville and Southwestern Railroad Company covering the same subject.

COMPARISON OF THE RATES ON LOGS UNDER THE CUMMER SCALE BETWEEN POINTS IN FLORIDA WITH RATES BETWEEN POINTS IN FLORIDA AND POINTS IN GEORGIA.

(5) The witness Price filed an exhibit (No. 1) consisting of eleven sheets (following R. 232), which compares the Florida intrastate rate per car of 50,000 pounds with the Florida-Georgia interstate rate. We will refer to only a few of those comparisons:

> At 50 miles the Florida rate is $10.50 and the interstate rate $25.00;
>
> At 100 miles the Florida rate is $13.00 and the interstate rate $35.00;
>
> At 150 miles the Florida rate is $17.00 and the interstate rate $45.00;
>
> At 170 miles the Florida rate is $18.50 and the interstate rate $47.50.

The sheets following this compare the rates intrastate in Florida with the rates on logs originating in Florida and moving corresponding distances to manufacturing destinations in Georgia. The Georgia destinations used are:

Bainbridge	Sheet 2
Albany	Sheet 3
Thomasville	Sheet 4
Quitman	Sheet 5
Valdosta	Sheet 6
Waycross	Sheet 7

Illustrating the discrimination shown in the exhibit mentioned:

A shipment moving on Cummer scale from Burnett's Lake, Florida, to Jacksonville, Florida, a distance of 72 miles, weighing 50,000 pounds, would pay $11.50; and the same shipment moving from Cody, Florida, to Bainbridge, Georgia, a distance of 74 miles, would pay $32.50—a discrimination against Bainbridge of $18.50 per car of logs. The same shipment moving from McAlpin, Florida, to Bainbridge, Georgia, 166 miles, would pay $47.50; and from Greers, Florida, to Perry, Florida, exactly the same mileage, it would pay $18.50—a discrimination against Bainbridge, Georgia, in that instance of $29.00 per car.

Sheet 3 shows the same kind of discrimination against Albany, Georgia; sheet 4 the same kind of discrimination against Thomasville, Georgia; sheet 5 the same kind of discrimination against Quitman, Georgia; sheet 6 the same kind of discrimination against Valdosta, Georgia; and sheet 7 the same kind of discrimination against Waycross, Georgia. Those Georgia towns are all prosperous places, of fair size, located on the Atlantic Coast Line Railroad Company in

South Georgia, all of them within the 170-mile distance and several of them quite close to the Florida line.

Further illustrating: A shipment of logs, 50,000 pounds, moved from Suwanee, Florida, to Jacksonville, Florida, a distance of 135 miles, would pay $17.00; while if the same shipment moved to Thomasville, Georgia, a distance of 112 miles, it would pay $40.00. It is estimated that it will take three cars of logs to make one car of finished material. (See note to sheets 8, 9, 10 and 11 of Exhibit 1). So when the logs have gone through the manufacturing process and a car load of lumber is produced in Thomasville, it starts off with a burden of $69.00 more than it would have had if it had been manufactured in Jacksonville, although the logs out of which the lumber was manufactured moved from the same point of origin. (See sheet 8 of Exhibit No. 1, which follows page 232 of record.)

The same kind of discrimination is shown against Quitman, Georgia, Valdosta, Georgia, and Waycross, Georgia. (See sheets 8, 9, 10 and 11 of Exhibit No. 1.)

See the evidence of the witness Price as to these subject matters (beginning R. 405). At page 413 the witness said:

> "Should the manufacturer at Quitman and Jacksonville both purchase logs at Suwanee, Fla., the manufacturer at Quitman would pay a rate of $35 per car for a distance of 85 miles, whereas his competitor at Jacksonville can get a rate of $17 per car for a distance of 135 miles, and the manufacturer at Quitman would have to absorb $54 on each car of finished material before he could meet the competition of his Jacksonville competitor, notwithstanding the distance from Suwanee to Jacksonville is 50 miles greater than Suwanee, Fla., to Quitman, Ga."

The witness Price's testimony is based upon the use of three cars of logs to make one of the finished product. Other witnesses have testified that it will take three and a half cars of logs to make one of the finished product.

At page 416 of the record the witness testified, after summarizing his Exhibit No. 1:

> "The Georgia manufacturers at Valdosta, Waycross and other points located on the border of Georgia and Florida undoubtedly have to meet the competition of all of these Florida manufacturers on any business they secure in Florida; it therefore follows that the Georgia manufacturer would be at a distinct disadvantage in securing any business on the Atlantic Coast Line in Florida, even if the rates on the finished material are the same from Georgia into Florida as the rates on finished products intrastate in Florida."

There are 65 saw and planing mills on the Atlantic Coast Line in the State of Georgia (R. 623). These mills with their locations are shown in Exhibit 26 (R. 361). 64 of these mills produce per month 16,065,000 feet (Ex. 37, R. 364, 368). The locations of these mills are shown in Exhibit 38 (following R. 368).

COMPARISON OF THE INTRASTATE RATES ON LOGS OVER THE ATLANTIC COAST LINE (CUMMER SCALE) IN FLORIDA, WITH INTRASTATE RATES OVER THE ATLANTIC COAST LINE IN NORTH CAROLINA, SOUTH CAROLINA, GEORGIA, AND ALABAMA, AND WITH THE INTERSTATE RATES, AND A COMPARISON OF THE AVERAGE INTRASTATE AND AVERAGE INTERSTATE RATES.

(6) Exhibit 52 (R. 394) by the witness Price, Rate Expert of the Georgia Commission, shows a comparison between the

Cummer scale of rates, that is, the rates on logs applicable over the Atlantic Coast Line in Florida for a distance of 170 miles (Column E) with the rates intrastate over the Atlantic Coast Line in North Carolina (Column A) and with other rates intrastate in North Carolina over the Atlantic Coast Line (Column B) (these are point to point rates covering a limited field), and with the intrastate rates in South Carolina (Column C), the intrastate rates in Georgia (Column D), and the intrastate rates in Alabama (Column F); the average of the interstate rates (Column G), the average of inter and intrastate rates (Column H), and the average of intrastate rates (Column I) and rates proposed by the Atlantic Coast Line Railroad.

The rate for 50 miles under the Cummer scale is 2.1 cents per hundred pounds. The same rate under one of the scales in North Carolina is 3.25 cents; the other scale in North Carolina 2.7 cents; the South Carolina scale 5.33 cents; the Georgia scale 3.5 cents; the Alabama scale 4.5 cents; interstate, 5 cents; average of inter and intrastate, 3.77 cents; average of intrastate, 3.56 cents. At 100 miles the relation of these rates continues practically the same. At 170 miles, the maximum distance to which the Cummer scale is applicable, very nearly the same ratio continues.

This witness says (R. 706):

> "The Cummer scale is the lowest scale that I have been able to locate."

The same witness said (R. 707):

> "The Georgia Commission is not advocating, in its true sense, any particular scale to be used in satisfying or in removing this alleged discrimination. We do say, and insist, that if the present intrastate rates in Florida

are found by the Interstate Commerce Commission to be reasonable rates for intrastate application in Florida, that that scale be used interstate from Florida to Georgia."

The witness (R. 708) is again insistent that, if the Cummer scale is reasonable, it should be extended to interstate commerce between Florida and Georgia.

Exhibit 52 (R. 394) is a very fair summary of the exhibits containing comparisons of rates.

COMPARISON OF THE RATES UNDER THE CUMMER SCALE WITH THE RATES ON THE SAME KIND OF LOGS ON OTHER RAILROADS IN FLORIDA.

SEABOARD AIR LINE

(7) The witness Abrams, who was then Commerce Agent of the Seaboard Air Line, submitted an exhibit showing a comparison of the various rates on logs in car loads reduced to cents per hundred pounds (Ex. 2, R. 234). He testified as follows (R. 434):

> "In column 1 is shown the so-called Cummer scale, which, it will be observed, is the lowest scale to be found and on the very lowest level and lower even than that prescribed by the Georgia Commission, but under suspension, as shown in column 12."

In 1915 rates were arranged in conference with the Railroad Commission of Florida, the representatives of the Seaboard Air Line Railway, and the Atlantic Coast Line. These rates represent Class P rates for a car of 40,000 pounds, then in effect, observing a minimum of $6.00 per car. They were made to induce the movements of timber from small tracts. The present equivalents of those rates over the Sea-

board Air Line are shown in Column 4 of Exhibit 2. In comparison with the Cummer scale, at 60 miles they are more than twice as high as the Cummer scale of rates; at 150 miles they are still somewhat more than twice as high. As compared with the interstate rates on the Atlantic Coast Line Railroad applicable between Alabama and Georgia points and between Florida and South Carolina points, the interstate rates are more than twice as high at 50 miles; also more than twice as high at 70 miles; and nearly three times as high at 170 miles. The Cummer rates are only about half as high as the rates prescribed by the Georgia Commission in 1925.

The witness testified (R. 436) that "by the comparisons I made I think they (the Cummer scale rates) are unduly low." The Cummer scale applicable to 25 miles is 1.71 cents, and under the interstate scale of the Atlantic Coast Line Railroad, for the same distance, 4 cents; at 75 miles the Cummer scale is 2.30 cents, and the interstate scale 6.50 cents; at 170 miles the Cummer scale is 3.70 cents, and the interstate scale 9.50 cents. The rate under the Cummer scale for 25 miles is 1.70 cents, and under the scale which has been fixed by the Georgia Commission intrastate in Georgia, for the same distance, 3.5 cents; for 75 miles the Cummer scale is 2.30 cents, and the Georgia rate 5.5 cents; at 100 miles the Cummer scale is 2.60 cents, and the Georgia rate 6 cents; at 170 miles the Cummer scale is 3.70 cents and the Georgia rate 8 cents. (The Georgia scale was fixed, as we have shown, in April, 1925, for use intrastate in Georgia, and was, at the time of the hearing, under suspension.)

The Seaboard Air Line operates about 1850 miles in Florida. In many instances its lines are substantially parallel with the Atlantic Coast Line, and the operating conditions are necessarily the same as those of the Atlantic Coast Line.

GEORGIA, SOUTHERN & FLORIDA RAILWAY

(8) The witness Potter (R. 450) in Exhibits 3, 4, 5, 6, 7 and 8 (beginning R. 237) makes comparisons of rates under the Cummer scale with those in effect over the Georgia, Southern & Florida Railway in Florida. The rates under the Cummer scale are applicable to cars of 50,000 pounds. The rates of the Georgia, Southern & Florida are applicable to cars of 30,000 pounds. At 50 miles the Cummer rate is 2.1 cents per hundred pounds, and the G. S. & F. rate 4.33 cents per hundred pounds; at 70 miles the Cummer scale rate is 2.3 cents, and the G. S. & F. rate is 5.0 cents; at 100 miles the Cummer scale rate is 2.6 cents, and the G. S. & F. rate 6 cents; at 120 miles the Cummer scale rate is 3.2 cents, and the G. S. & F. rate 6.66 cents.

Thus the rates for intrastate log transportation in Florida over the Georgia, Southern & Florida Railway are about twice as high as are the rates for the same kind of transportation in the same state over the Atlantic Coast Line Railroad.

Exhibit 5 (R. 239) is a comparison between the Cummer scale rates and the G. S. & F. interstate scale into Georgia. The disparity pointed out between the Cummer scale rates and the G. S. & F. interstate rates into Georgia is accentuated in this latter comparison. For instance, at 50 miles the Cummer scale rate is 2.1 cents, and the G. S. & F. Georgia interstate scale rate, 5.8 cents; at 100 miles the Cummer scale rate is 2.6 cents, and the G. S. & F. interstate scale, 8.9 cents; at 120 miles the Cummer scale rate is 3.2 cents, and the G. S. & F. Georgia interstate rate, 9.4 cents.

Exhibit No. 6 (R. 241) is a comparison between the Cummer scale rates and the rates of the G. S. & F. Railway inter-

state from Florida stations to Valdosta, Georgia, and from Georgia stations to Lake City, Florida. The disparity in the rates pointed out in the other two exhibits continues in varying degree but none the less very marked.

Exhibit No. 7 (R. 243) shows the G. S. & F. interstate scale from Florida stations to Valdosta, Georgia, and the A. C. L. interstate scale from Florida stations to Valdosta, Georgia, and the Cummer scale, and the rates used by the Southern Railway interstate. The Cummer scale rates are from only one-third to one-half of any of the other rates (the Cummer scale rates in this exhibit are those under column 3 which is headed "Rates sought by complainant from A. C. L. stations in Florida to Valdosta, Georgia").

Exhibit No. 8 (R. 245) compares rates on logs in car loads between the Atlantic Coast Line Railroad stations in Florida with rates between stations on the Southern Railway in various states, to-wit: Georgia, North Carolina, South Carolina and Alabama. The same striking disparity exists, and the Cummer scale rates are only a third to a half of the other corresponding rates.

CENTRAL OF GEORGIA RAILWAY

(9) The witness C. D. Chancellor, Assistant General Freight Agent of the Central of Georgia Railway Company, testified (R. 455) that "the Central of Georgia has only a short mileage in Florida." Its interest in the case was stated to be "the far reaching effect if the Florida rates (the Cummer scale) are extended into Georgia, the far reaching effect they may have on the Georgia rates intrastate, and also the Alabama rates, and the rates applicable from interstate points on the rails of the Central of Georgia."

The witness further said (R. 466):

> "The Central of Georgia Railway intervened in this proceeding because it considers the rates now maintained by the Atlantic Coast Line Railroad for intrastate application on logs within the State of Florida to be unduly and unreasonably low, and detrimental to its interests. If the very low rates in Florida are continued, and extended for application from Florida into Georgia, it is felt that these rates would possibly influence the Georgia Public Service Commission in prescribing rates for general application throughout the State of Georgia, and likewise would possibly influence the Alabama Public Service Commission in reopening the question of intrastate rates within the State of Alabama, with a view to making lower rates than those now in effect, which were prescribed by its order of April 29, 1925, docket 4136.
>
> In other words, it is the far reaching effect that the continuation of the low Florida rates may have on the revenue of this company with which we are concerned.
>
> It is my understanding that the presence of these Florida intrastate rates was seriously urged by the Georgia Commission as a reason for not enforcing its decision as to log rates in the State of Georgia."

COMPARISON OF THE RATES ON LOGS UNDER THE CUMMER SCALE WITH THE RATES ON OTHER COMMODITIES.

(10) Exhibit 18 by the witness Perrin (R. 279) is a comparison of the per car revenue on logs interstate and in Florida intrastate over the Atlantic Coast Line with the per car revenue on other commodities moving between the Atlantic Coast Line stations in Georgia, on the one hand, and, on the other hand, stations on the Atlantic Coast Line in Florida north of High Springs.

The witness says (R. 481):

> "Brick and road-building materials constitute an unusually heavy character of traffic, and I know of no traffic on the Atlantic Coast Line, other than logs, that is handled on a lower basis of rates."

This Exhibit 18 shows that at 50 miles the Cummer scale of rates is only about 40 per cent. of the corresponding interstate scale; that it produces only about one-third of the revenue per car which is produced by brick; and an even less percentage of the revenue from a car of gravel or sand, or lime or cement.

The comparison continues in about the same ratio throughout the various distances up to one hundred and seventy (170) miles. Above one hundred and seventy miles the scales of rates draw much more nearly together. For instance, at 170 miles the interstate scale is shown to be 9.5 cents per hundred on logs, and the Cummer scale is 3.70 cents per hundred. At 180 miles the interstate scale is shown to be 9.5 cents (the same as for 170 miles) and the intrastate scale is 8.33 cents. The Cummer scale ends at 170 miles.

At Exhibit 22 (R. 287) the witness Perrin compares the tonnage, average distances hauled, and revenue results from the transportation of various commodities of the lowest transportation characteristics moved on the Atlantic Coast Line Railroad during the month of May, 1926. These include cotton seed, cotton seed hulls, clay, gravel and sand, stone, asphalt, salt, phosphate rock, cord wood, cross ties, cement, brick—artificial stone, lime—plaster, fertilizer, logs. This shows that 168,756 tons of logs moved; that this made 7.26 per cent. of all tonnage. The logs produced $121,015.66 of revenue, which is 2.05 per cent. of all freight

revenues. The per ton revenue was 72 cents, which was the lowest per ton revenue of any of the commodities mentioned. The average haul was 109 miles. The revenue per ton mile was .0066. The relation of percentage of all freight revenue to percentage of all tonnage was 28.4 per cent. At page 482 the witness deals with this, saying:

> "The purpose of this statement is to indicate the low earnings on logs as compared with any of the other commodities, bearing in mind that all of these commodities constitute the lowest grade of traffic that we handle. The comparison that I desire to show is concentrated in the last column, which shows, for instance, as to cottonseed that the percentage of all freight revenue is 61½ per cent. of the percentage of all tonnage; as to gravel and sand, the statement shows that the percentage of all freight revenue is 34½ per cent. of the percentage of all tonnage. The statement shows that as to fertilizer, the percentage of all freight revenue is 83.8 per cent. of the percentage of all tonnage; as to logs it shows that the percentage of all freight revenue is 28.4 per cent. of the percentage of all tonnage."

The witness says (R. 483):

> "This statement is merely one method of substantiating our statement that under the present level of rates, logs are the lowest revenue producers of all of our traffic."

He then states:

> "We are convinced that our log rates, as a whole, have become inordinately low and that the revenues derived from the transportation of logs as related to the service performed are so low as to suggest a doubt about fairness to shippers of other classes of traffic. In making this statement I have in mind not only the intrastate log rates in Florida, but the log rates applicable generally on the Atlantic Coast Line.

"The purpose of the testimony that I have given up to this time is to show that, intrinsically, our interstate mileage scale on logs is reasonably low, and that it would be out of the question to substitute therefor any scale, even approximating our Florida intrastate scale, for distances up to 170 miles."

The same witness testified (R. 507, 508):

"There is nothing in the characteristics of logs as freight traffic that would justify any lower level of rates on logs than on sand and gravel, either as to the transportation revenue results, or from the value or claim damage standpoint or any other transportation features that you might consider. * * * As to whether the rates on logs should be lower or higher than the rates on these other commodities, they are all cheap, they are all heavy, they are all without claim risks, there is no condition that I know of, with the possible exception of cement, which might have a higher value that would probably justify a lower rate than logs. * * * Logs should carry higher rates than sand and gravel. * * * There is more risk in the handling of logs than there is on these other commodities. The log traffic is to a certain extent dangerous. * * * There are many logs that fall off trains as they go along, and all that is dangerous."

COMPARISON OF THE RATES ON LOGS UNDER THE CUMMER SCALE WITH THE RATES ON BRICK.

(11) A carload of logs moving from Florida interstate 50 miles will carry a rate of 5 cents per hundred pounds; logs moving in Florida intrastate under the Cummer scale will carry 2.10 cents; while brick moving from Georgia to Florida interstate will carry 5 cents; sand and gravel will carry 4.30 cents; lime, 7.90 cents; cement, 8.45 cents. The revenue on a car of logs weighing 55,000 pounds moving interstate 50

miles from Florida would be $27.50. The revenue from the same car of the same loading moving 50 miles intrastate under the Cummer scale would be $11.55. The revenue on a car of brick weighing 65,580 pounds from Florida to Georgia would be $33.29; on gravel and sand weighing 92,540 pounds, $39.79; on lime weighing 49,020 pounds, $38.73; and on cement weighing 70,740 pounds, $59.78. The Florida intrastate movement car would produce a revenue much less than one-half of the interstate movement of the same car for the same distance, and would produce only about one-third of the revenue that would have been produced on the heavier carload of brick, substantially less than one-third of the revenue on the much heavier carload of gravel and sand; substantially less than the carload of lime, which is not so heavy, and less than one-fifth of the revenue on the carload of cement, which is about 15,000 pounds heavier than a carload of lumber. The same comparisons continue with approximately the same disparities. (R. 270, 280, 290.)

Exhibit 19 (R. 282) by the witness Perrin is a comparison of the per car revenue on logs moving over the Atlantic Coast Line interstate and in Florida intrastate with the per car revenue on other commodities moving intrastate in Georgia. This exhibit shows that a car of logs weighing 55,000 pounds and moving 50 miles intrastate in Florida under the Cummer scale would produce $11.55 of revenue, and the Georgia intrastate revenue on brick, gravel, sand, lime, and cement would be $33.29 for brick, $37.02 for gravel, $32.39 for sand, $36.03 for lime, $65.40 for cement; and the rates and revenues applicable to other distances show the same kind of disparity and discrimination.

Exhibit 20 (R. 284) by the witness Perrin compares the per car revenue on logs moving over the Atlantic Coast Line interstate and Florida intrastate with the per car revenue of other commodities moving intrastate in Florida. At 50 miles a Florida intrastate log car of 50,000 pounds would produce $11.55; a car of brick, $37.75; a car of limestone, $41.64; a car of sand, $38.59; a car of lime, $44.12; a car of cement, $67.91. All of those cars are heavier than a car of logs except a car of lime, which is 49,020 pounds. The same kind of disparity between these rates continues for other distances.

COMPARISON OF THE PERCENTAGE RELATIONSHIP THE CUMMER SCALE RATES ON LOGS BEAR TO LUMBER RATES ORDERED BY THE INTERSTATE COMMERCE COMMISSION IN THE MERIDIAN CASE (60 I. C. C. 5) AND ALSO TO BASIC MILEAGE SCALE APPLIED ON LUMBER BETWEEN SOUTHEASTERN AND CAROLINA TERRITORIES.

(11a) The Interstate Commerce Commission in the case of Meridian Traffic Bureau vs. Southern Railway Co., 60 I. C. C. 5, prescribed rates on lumber. We have seen that it takes about three cars of logs to make one car of finished product, lumber. At 50 miles the rate on lumber prescribed by the Commission in the Meridian case is 9 cents. The basic scale of lumber rates between Southeastern and Carolina territories is 8.5 cents. The Atlantic Coast Line interstate rate on logs is 5 cents. The percentage relationship which the Atlantic Coast Line Railroad interstate log rates bear to the lumber rates under the Meridian scale at 50 miles is 55.6 per cent., and under basic scale of lumber applied between Southeastern and Carolina territory is 58.9 per cent. This relation-

ship continues, varying slightly, through other brackets of distance. (Exhibit 21, R. 286.)

The witness Perrin testified as to this exhibit (R. 482):

> "Perhaps it will be fair to say that the exhibit shows that the Atlantic Coast Line interstate log rates are about 55 per cent. of the lumber rates to Meridian and about 60 per cent. of the lumber rates under the carriers' basic scale. The log rates heretofore prescribed by the State commissions in Florida and Georgia have been 60 per cent. of the rates prescribed on lumber. I know of no instances where a lower percentage relationship has been adopted. In South Carolina the Railroad Commission prescribes on logs 80 per cent. of the lumber rates."

SOME OF THE FINDINGS OF THE COMMISSION

The Commission said (R. 25):

> "It is manifest, we believe, that the intrastate rates assailed, which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory. The rate for 160 miles yields but 4.25 mills a ton-mile, and, based on a lading of 60,200 pounds, 12.8 cents a car-mile. They are approximately one-half of the rates prescribed in Rates on Chert, Clay, Sand, and Gravel, 122 I. C. C. 133, on sand and gravel in the Southeast and less than one-half of the rates prescribed in the supplemental report in that case, 140 I. C. C. 85, to points in Florida south of the Jacksonville-River Junction line of the Seaboard Air Line. As stated in the original report in that case, sand and gravel are of unusual low value, it being doubtful whether any traffic moves which is worth less at point of production, load very heavily, and normally move in considerable volume without unusual switching operations at either end and without anything in the nature of special services. The evidence is not convincing that logs could

not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level."

The facts which we have shown were proved before the Commission amply sustain these findings.

We submit that the facts to which we have referred, which are wholly uncontradicted, make "substantial evidence" justifying the finding of the Commission that:

> "The Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce" (R. 26).

We further submit these facts make substantial evidence quite ample to justify the finding of the Commission that:

> "Whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce, the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions" (R. 26).

THE EXTENT OF DISCRIMINATION WHICH WILL BE WORKED BY THE CONTINUANCE OF THE CUMMER SCALE OF RATES.

(12) That the extent of the discrimination, which will be worked by the continuance of the Cummer scale of rates, is very great, as shown by the facts already set out. As, for instance, the Brooks-Scanlon Corporation has 1,027,432,000

feet of pine and cypress, equivalent to 186,800 car loads (ex. 41, R. 379). The Cummer Cypress Company has timber which, when logged, will amount to 127,158,000 feet, which is equivalent to 28,257 car loads of logs (R. 313, 320). The Wilson Cypress Company has 250,000 feet of cypress which, when logged, will produce 59,529 car loads. The Putnam Lumber Company has more than one billion feet of pine and cypress (R. 596).

The aggregate of the differences in revenue which is produced to the carrier by applying the Cummer scale of rates and the rates which the Commission has found to be reasonable is very great, enough to be not only substantial, but sufficient to impose a staggering burden.

UNDUE DISCRIMINATION WHICH THE CUMMER SCALE WORKS AGAINST THE GEORGIA MANUFACTURER OF LUMBER IN THE MARKETS OF CONSUMPTION.

(13) In making these calculations 150 pounds of logs is treated as equivalent to 50 pounds of lumber, and the calculation is made upon the application of the published rate tariffs and schedules, and the rates shown in Exhibit 45 (R. 384). If the logs are brought into Jacksonville over the Atlantic Coast Line, a distance of 150 miles from the point of origin in Florida (that being about the distance of the greater shipments), the freight rate will be $51.00. If those logs are manufactured into lumber and produce 50,000 pounds and are sold in Portland, Maine (this is one of the points of market testified to) (R. 574), the freight will be $225.00. Aggregating those two charges, the freights paid on the logs from forest to mills, plus the freight on the lum-

ber from the mills to market, will be $276.00. If the logs which were used in manufacturing the same lumber had moved on the interstate rate to a manufacturing point in South Georgia and had been shipped to the same destination, the aggregate of the two freight charges would have been $337.50, and the Georgia manufacturer would have been at a disadvantage of $61.50 per car in offering his lumber in the market at Portland, Maine. If the lumber had been offered in Washington, Baltimore, Philadelphia, Jersey City, or Boston, the discrimination against the Georgia manufacturer would have been exactly the same. Of course, these circumstances would work a discrimination against the Georgia manufacturer in favor of the Florida manufacturer in any market in which they might compete. There was no denial in the record that these facts gave to the Florida shipper an advantage. The principal market for cypress lumber is in the Northeast Atlantic from Baltimore to Portland, Maine (R. 574) (R. 604).

The General Manager of the Wilson Cypress Company, testified (R. 574):

> "We meet very little competition from Georgia mills."

The same witness testified (R. 582):

> "If we enjoy a rate a third of what our competitor pays, we have an advantage over him in the market."

If there were no more, this would seem to amply justify the Commission's finding of preference, prejudice and discrimination. The extent of the preference, prejudice and discrimination we have undertaken to show. The question then comes, how much discrimination is necessary to give the favored competitor monopoly of the market and to drive the unfavored competitor out of the market?

The President of the Putnam Lumber Company testified (R. 615):

> "I don't think that the output of the Bray Lumber Company finds a market in the same territory. They sell most of theirs to the railroads that are right there, I understand; they don't ship the same people we do; *they could not do it because we have ten or twelve dollars a thousand advantage over them.*"

At page 618 the witness shows that this difference is due to the advantage of water rates. The Bray Lumber Company is located at Valdosta, Georgia.

At page 620 the witness, speaking of the Georgia manufacturer, Jackson, who operated at Valdosta, said:

> "Now if he tried to ship lumber into Boston or New York or Portland, Maine, against our nine-dollar man, he would be lost, he would have twelve to fifteen dollars arbitrary to overcome."

At page 621, in the same connection, the witness said:

> "That means a lot to a mill man."

He also testifies (R. 621) that his competition in New England is with the Pacific and Gulf mills.

We thus establish that ten or twelve dollars advantage per car in freight rates is enough to give one competitor the market and drive the unfavored competitor out of the market. We then see that the advantage worked by the Cummer scale is a great deal more than ten or twelve dollars; that in great markets to be found in the Eastern Seaboard cities, which have been mentioned, the advantage is more than five times twelve dollars per car, or $61.50. We then see that there is no competition in these Eastern cities from the Geor-

gia mills, and we find in the testimony of the Florida mill men the reason for this lack of competition; and one of them was able to testify that "We never hear of them any more than if they were not on the face of the earth" (R. 605). This result was attributed by the witness to the outgoing rate advantage. It seems to be quite clear that an incoming rate advantage greater than the outgoing rate advantage would also have the same kind of effect.

THE TERRITORIAL EXTENT OF THE INVESTIGATION OF THE LOG SITUATION IN FLORIDA.

(14) The record shows that Brooks-Scanlon Corporation owned 460,000 acres in Taylor, Jefferson, Madison, Dixie, LaFayette, Alachua, and Wakulla Counties. Those counties cover a large part of the northwestern portion of the peninsula of Florida and run well towards the east coast. These lands contain over a billion feet of timber (R. 657 and Ex. 41, R. 378). The Putnam Lumber Company owned large tracts in Dixie, Taylor, LaFayette, Volusia and Flagler Counties. Volusia and Flagler Counties are on the east coast south of St. Augustine. These holdings have something over a billion feet of pine and cypress (R. 596 and Ex. 35, R. 360). Wilson Cypress Company has headquarters at Palatka, Florida. Its timber is located in LaFayette, Dixie and Taylor Counties (R. 570) and it has approximately 250 million feet of timber (R. 572 and Ex. 32, R. 336). The Cummer Lumber Company and the Cummer Cypress Company own large tracts of land, having a plant at Lacoochee, Florida, which is in Pasco County on the west coast about midway the state. It has one tract of timber adjacent to that plant containing about 268 million feet (R. 569); it has another tract located near Otter Creek (Levy County) containing about 23 million feet

(R. 569); and one tract near Homosassa containing about 29,298,000 feet. Homosassa is in Citrus County on the west coast north of Pasco (R. 567). It also has another tract on the Withlacooche River containing about 74,860,000 feet of timber which will be shipped from Inverness to Lacoochee (R. 568). Inverness is in Citrus County. There are manufacturing plants at Eastport, which is near Jacksonville, at Milldale, which is near Jacksonville, at Palatka and at Lacoochee.

The Commission also investigated the condition at Lake Wales where a large mill is being established; this is in about the center of the peninsula; at Seers where another large mill is established; this is in the County of Hendry, far down in the southern part of the peninsula; at Sherman, which is on Lake Okeechobee in the southern part of the peninsula and near the east coast; and at Holopaw (the record does not show where that is located, but it is south of Tampa). There are large mills at all of these places (R. 608). "All of those mills have been built at the timber"(R. 608).

The witness Price, in his Exhibits Nos. 1 and 46, showed an investigation of a number of points in Florida, illustrating the discrimination. Those points include Hardeetown, Usher, Otter Creek, Lebanon, Tidewater, Steen, Dunnellon, Ladonia, Hernando, Inverness, Floral City, Pineola, Croom, Trilby, Dade City, and Lumberton. He also gave direct testimony in reference to them and to quite a number of other places (R. beginning p. 405). A number of other places were dealt with by Mr. Price in the above mentioned exhibits.

It must be remembered that the state rate condemned was applicable up to 170 miles on the Atlantic Coast Line in

Florida, whether that distance was in one part of the state or the other.

The places referred to and the many places in the more northern part of the State of Florida cover practically the entire state; and, realizing that each point of investigation carries with it the radius of 170 miles, it is easy to be seen that the conditions in the entire state were well investigated.

We attach hereto a map of Florida with Perry in Taylor County as the central point. It shows circles made with radii as long as 170 miles. These give illustrations of how far a shipment of logs will be transported under the scale prescribed by the Interstate Commerce Commission in this case for a given amount of money and how far the same amount of money under the Cummer scale will move the same logs. Under the Cummer scale a rate of 3.7 cents per hundred pounds of logs will pay for the carriage of the logs anywhere within the radius of 170 miles over the Atlantic Coast Line, while under the interstate scale, 3.5 cents will carry the same logs in a circle having a radius of only 30 miles. These circles when getting to a radius of 50 miles pass into the State of Georgia and, of course, go deeper into the State as the radii extend, while the Cummer scale of rates move in all directions described by these radii, so long as those movements are in Florida, and on the Atlantic Coast Line; they cease the moment the Georgia line is reached.

Logs moving under the Cummer scale while moving wholly within Florida will go many times further than if the same logs on the same cars and on the same company's rail moved at the same time into the State of Georgia. The conditions of traffic were found, as we have pointed out, by the Commission for the two movements to be substantially the same.

COST STUDIES

(15) A cost study was made by the witness J. Lowell White, Superintendent of Transportation of the Atlantic Coast Line Railroad Company (R. 522). This shows that the cost per car for handling this log traffic in the service performed for Brooks-Scanlon Corporation from Perry and Carbur to Eastport, Florida, was $19.13. (Perry and Carbur are in Taylor County, which is on the west coast; Eastport is a suburb of Jacksonville, which is on the east coast). This does not include taxes or equipment rentals. The average revenue per car is shown by the witness Perrin to be $20.47 (R. 522). The average haul from Perry and Carbur to Eastport and Milldale is 158 miles. This left $1.34 out of which was to be taken taxes and equipment rentals. The taxes were testified to be "not inconsequential" (R. 529). It would seem that this service was being performed under this testimony at an inconsequential net return even when taxes and equipment rentals were not considered. If those charges had been considered, in all probability it would have shown that the log rate produced no profit but a loss. The Florida Commission introduced a witness on cost, Pettijohn (R. 629). He estimates that there was a profit of $5.85 per car.

The Commission in its report says (R. 23):

> "Both cost studies are based on certain arbitrary assumptions and both are based on movements in trainloads from two points of origin to one destination. Neither can be accepted to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida. The record shows that while most of the Florida intrastate log traffic is in trainloads, there is a substantial movement over defendant's line in less than trainloads."

The Court in its opinion of March 22, 1929 (R. 169), referring to this cost evidence given by the witness for the Atlantic Coast Line and by the witness for the Florida Commission, said:

> "Certainly no other litigant could have known the facts better than they. In rejecting the conclusion of slight net income asserted by the witnesses, the Commission did not rule out the basic facts shown, but was at liberty to supplement them and construe them for itself, and make its own conclusion from them. * * * On the face of things the log rate is too low and likely to burden the carrier. The Commission expressly finds that it is obviously unremunerative. It is shown that the commerce in logs over the Coast Line system is and will continue to be very large and this item of its rates is therefore an important one."

The witness White (beginning at page 522 of the record, recalled, page 709, and in Exhibit 25, revised, beginning at page 294 and continuing into page 307) gave in detail the factors used in making his calculations. At page 299 there is a statement of each day's movements of this traffic, showing the number of train miles, the number of loaded cars, the number of empty cars, log car miles loaded, log car miles empty, other car miles, cab and idler car miles, and total car miles. This exhibit shows (R. 304) the various charges to direct and indirect items of expense; and in the form required by the Interstate Commerce Commission's accounting rules, it shows the charges to maintenance of way and structures, maintenance of equipment, traffic, transportation, and general charges. Some additional facts shown are:

(a) The rates to be applied.

(b) The distances of the movements (R. 470).

(c) The average number of cars of lumber in a train load (Ex. 29, 30).

(d) The service contracts governing the operation of the service (Ex. 31, 33, 34).

(e) The amount of freight paid, and the rate per thousand feet on the earnings per car (R. 360).

(f) A description of the work done by the railroad company at the yards, including almost every conceivable detail of service (R. 591).

(g) The amount of wages actually paid (R. 523).

(h) Cost of fuel and supplies.

(i) Cost of hostling and turning the engines.

(j) Cost of operating the type of yard engine used in the service (R. 524).

(k) The cost of the engines (R. 524).

(l) The time of each trip (R. 524).

(m) The assignment of five locomotives to perform the service (R. 524).

(n) The rate of depreciation on those engines.

(o) The maintenance and equipment of the locomotives.

(p) The direct and indirect charges (R. 525).

These facts would appear to present everything necessary for the ascertainment by an accountant of the cost of rendering this service. The difference between the accountants for the Florida Commission and for the Atlantic Coast Line is shown at Exhibit 39 (R. 271), and this was before the Commission. The Commission's statement to the effect that "both cost studies are based on certain arbitrary assumptions" appears to have been sustained in that "both are based on movements in train loads from two points of origin to one of destination" and in that the Commission found "there is a substantial movement over defendant's lines in less than train

loads." There is no dispute as to either of those facts, and, of course, those facts tend to increase the cost of the movement, and those facts were clearly before the Commission. There is nothing in the Commission's report to justify the assumption drawn by the appellants that the Commission went out of the record to get any fact in reference to the cost of these movements. The Commission had the right to apply its experience and knowledge of traffic and accounting matters to the facts proved in order to ascertain the value of those facts. There is nothing in the opinion of the court below which suggests that the supplementation referred to in that opinion meant that the Commission had gone out of the record. When the court referred to the fact that the Commission "was at liberty to supplement them (cost studies) and construe them for itself and make its own conclusion from them," of course, it was meant that the Commission was at liberty to supplement those studies from the facts in the record.

The cost studies of the movement under these rates are after all only one element in determining whether the rates were or were not reasonable. There was ample evidence aside from this to show to the Commission that the rates were wholly unreasonable.

At page 25 of the record, the Commission in its report says:

> "It is manifest, we believe, that the intrastate rates assailed, which on the average are less than half of the proposed interstate rates, are less than reasonably compensatory."

TIMBER IN THE NORTHERN PART OF FLORIDA AVAILABLE FOR USE IN GEORGIA.

(16) Frequently in the record the representatives of the large mills have testified that there was no timber available in North Florida which might be used in the South Georgia mills because that timber was owned by the large mills.

The Commission held in its report (R. 25) that:

> "The evidence is not convincing that logs could not or would not move from Florida to Georgia if the interstate rates and the Florida intrastate rates were on the same level."

The Court in its first opinion, noticing this contention, said (R. 49):

> "This contention is well supported so far as concerns large tracts of timber, logs from which would move in train loads, as do most of those in Florida now handled by the Atlantic Coast Line Railroad. But the rate assailed is not a train load but a car-load rate, and the evidence abundantly justified the conclusion that there is an indefinite quantity of what is called 'scattered timber,' not yet cut, in north Florida, which is not owned by Florida mills and which the Commission could find would be as likely to move to Georgia as to Florida points if a rate parity were afforded."

Supporting this finding of the Commission and of the Court, we quote some of the evidence adduced before the Commission:

The witness Giddens testified (R. 532, 533):

> "I am interested in the manufacture of logs at Valdosta, Ga., into various forms of lumber, and come into direct competition with Florida manufacturers of

logs. The demand for logs for my mill carries me into Florida for distances up to 170 miles on the Atlantic Coast Line Railroad. I cannot draw logs from the distance and on the railroad as just referred to at the present time on account of the rates. The rates from these points in Florida to Valdosta, Ga., are higher than I can afford to pay. If the rates complained of in this case, maintained by the Atlantic Coast Line Railroad between points in Florida up to 170 miles, were to be extended to Valdosta, Georgia, that would relieve this condition that prohibits me from drawing logs from Florida at this time. I had in mind one or more locations of logs that I could buy if the rates of which I complain were different; that is, if I were placed on an equal basis with Florida manufacturers."

The witness testified that the logs around Valdosta are "mostly cut out".

He then testified (R. 534):

"There is timber that I can buy within 170 miles of Valdosta on the Atlantic Coast Line Railroad that I want to buy and expect to buy if we can get a rate."

The witness was then asked to locate this timber and he says that is an unfair question, and then adds (R. 534):

"At the hearing that you held in Valdosta, the same question was asked Mr. Jackson, and he and I were figuring on a tract of timber. * * * and I would say in just a few days after the hearing that that tract of timber was sold. I know something about it. The location of that timber was revealed by Mr. Jackson under the same circumstances as obtain here. And the lumber was bought in the next two weeks."

The tract of timber referred to was said to contain 190,000,000 feet (R. 422). The evidence admits that this was sold a few days after the closing of the Valdosta hearing.

It was contended by appellants that the negotiations were pending for the purchase of this land before the Valdosta hearing. There is considerable evidence to the effect that there was no timber in North Florida which could be bought; that the timber was in the hands of large mill owners (R. 578, 579, 585, 602). In saying that there are no large timber tracts in North Florida, these witnesses did not mean to exclude small tracts. For instance, one witness (R. 602) confines his statement to merchantable tracts and described merchantable tracts as those containing "anywhere from six or seven million feet up". The same witness says (R. 602):

> "There is merchantable timber within 150 miles of the Georgia line, but it is not available for sale to or purchase by Georgia mill operators because it is already owned by these saw mill operators who have big investments in saw mill properties."

Another witness states (R. 664) that he does not mean to say that "every one of the trees in this area in Florida is owned by those companies (the large companies), not at all. Some farms have a few acres of some kind of timber."

The witness Jackson testified (R. 446) that he contemplated buying timber at Cross City, Florida, small tracts, from farmers, but concluded not to purchase; the freight rate was too high and that the rate prevented him from investigating other tracts.

The witness Simmons testifies that there is quite a lot of "scattered stuff like we use" in Florida south of Thomasville, Georgia, and that this would be bought if they had a reasonable log rate from Florida (R. 432).

The witness Davis (R. 544, et seq.) testified that he was in business at Climax, Georgia, and he had hardwood timber

offered to him, standing or loaded on cars in Florida, and because of the rate had to abandon the purchase and also abandon the idea of building another hardwood mill; that the timber was within 170 miles of Climax, in the State of Florida, on the Atlantic Coast Line; that if the Florida scales of rates were extended to Georgia he would be in position to buy certain grades of logs in Florida, and the reason he doesn't buy them now is because of the low rate in Florida as compared with the high rate between Florida and Georgia.

The witness McCain, cruiser for Brooks-Scanlon Corporation, testified (R. 690) that "there are scattered small pieces (timber lands) owned by settlers or farmers, which we speak of as odds and ends," located on the Atlantic Coast Line in Northern Florida. He also speaks of other timber lands lying next to the large holdings. This witness identified Exhibit 44, which is a map of this part of Florida, giving some description of the timber therein.

The Atlantic Coast Line's line south of Thomasville, Georgia, is what is known as the Perry branch.

We submit that this evidence shows two things: First, that the Commission and the Court were amply justified in the conclusion that there was timber in North Florida which, when cut into logs, would move into Georgia upon an equalized rate; and, second, that the unduly low and unreasonable rate in Florida, which would apply only on intrastate traffic moving on points of the Atlantic Coast Line, was having its natural effect, which burdened the movement of interstate commerce to such an extent as to be almost startling and to make a very great imposition on interstate commerce.

These great tracts of timber in Florida near the Georgia line sent their product in accordance with the rate. That is,

those logs moved, as they naturally should, on the lowest rate, and that carried them not into Georgia but into Florida, and had the effect of putting an economic wall between the Florida forests and the Georgia mills as completely as though it were some great natural barrier. This seems to be a complete and perfect illustration that the rates had accomplished and were accomplishing the wrong which the law undertakes to prohibit.

RATES IN SOUTH FLORIDA

(17) By South Florida is meant that part of the state south of the line running through Jacksonville, Gainesville, Burnett's Lake and High Springs, Florida. We have pointed out that the rates below this line in Florida are generally higher than the rates above it (R. 487-8-9). The South Florida interstate rate is shown at Exhibit No. 11 (R. 255). Exhibit No. 23 carries forward this comparison.

In Florida the Cummer scale applied on intrastate shipments whether in North Florida or in South Florida. After the 170-mile distance had been passed and the Cummer scale ended, then the Florida Class P rates applied. At 50 miles the South Florida interstate scale is 7.10 cents per hundred pounds; while the Cummer scale is 2.10 cents. At 100 miles the South Florida interstate scale is 8.96 cents; and the Cummer scale 2.60 cents. At 150 miles the South Florida interstate scale is 10.40 cents; and the Cummer scale 3.40 cents. At 170 miles the South Florida interstate scale is 10.80 cents; and the Cummer scale 3.70 cents. Then the Cummer scale ends. At 180 miles the South Florida interstate scale is 11.30 cents; and the Florida intrastate scale 8.33 cents. The difference in rates below this line and south of the line has been

recognized by the Commission, as pointed out by the witness Perrin (R. 489) where he cites:

> Florida Fruit & Vegetable Shippers Protective Ass'n vs. Atlantic Coast Line Railroad, 14 I. C. C. 476, and subsequent cases of the same nature in 17 I. C. C. 552, 22 I. C. C. 11;
>
> Florida Growers & Shippers League vs. Alabama & Vicksburg Railway Co., 43 I. C. C. 595;
>
> Dawson Produce Co. vs. Atlantic Coast Line, 49 I. C. C. 291.

At page 489 he says:

> "I may say generally that in these decisions, while they bore upon the principle that the rates to and from Florida should and might be made on Jacksonville combination, of course, the effect of those decisions was to make the rates higher than customary in the south, and the Commission, as I have previously stated, has recognized different Florida operating conditions."

The discrimination worked by the Cummer scale in North Florida, therefore, greatly increased in South Florida. The insufficiency of the rates and the unreasonableness of them in North Florida became all the greater in South Florida.

The differences in the conditions in South Florida led the witness Perrin (R. 486) to exclude that territory from his expression of willingness to adopt, for interstate application throughout the length of the line of the Atlantic Coast Line, the same rates as are applicable in the State of Alabama.

SIMILARITY OF CIRCUMSTANCES AND CONDITIONS

(18) The interstate and intrastate transportation services involved in this matter are performed by the defendant under

substantially similar circumstances and conditions. The Commission so found (R. 26). This finding is amply supported by the evidence. It was the discrimination worked against the Georgia shippers by the Florida intrastate rates that brought about the filing of the Georgia Commission's petition before the Interstate Commerce Commission (witness Price R. 402, 403). The Georgia Commission had proposed to increase its own intrastate rates and met with complaints from the Georgia shippers that this increase would drive them out of business because of the competitive Florida condition (R. 403).

The witness Simmons (R. 427) speaks of the line between Florida and Georgia as an "imaginary" line. The witness Price, rate expert of the Georgia Commission, testified that if the Cummer scale is a reasonable one for application intrastate in Florida, then he insists that it is a reasonable scale for application interstate from Florida to Georgia (R. 707). He repeats in substance this statement at page 708.

The witness Perrin (R. 483) testifies:

> "I believe that there is a situation immediately around us that will necessitate the fixing of a uniform scale of rates on the Atlantic Coast Line railroad less than might reasonably be expected and made independent of log rates elsewhere that may have been higher under the circumstances and conditions substantially different from those existing in our territory."

At page 477 the same witness testifies:

> "The Atlantic Coast Line serves the states of Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama, and operates through those parts of practically all of these states in which the tonnage of logs is heaviest, and if anything approaching the Cummer scale

should be made the measure of the reasonableness of our log rates generally, the result from a revenue standpoint, could not be justified,"

Exhibit 17, R. 275, shows the scale of rates on logs prior to August 15, 1929, and "the present interstate scale uniformly applicable since that date." This exhibit shows the Alabama interstate scale, the Georgia interstate scale, the general interstate scale, the average of these scales, and the then present interstate scale.

Exhibits 18, 19, 20, and 22 give various comparisons of the Florida log rates with other rates, and the relation of the Florida log rates to rates established in other cases, such as the Meridian case (60 I. C. C. 5).

Exhibit 22 shows the tonnage, average distances hauled, revenue results, and percentages on logs and other commodities of like transportation characteristics which moved over the Atlantic Coast Line railroad in the month of May, 1926.

The intrastate scale on logs in Alabama is compared with scales prescribed by the Interstate Commission in the Meridian case (60 I. C. C. 5), and in the Pierpont case (59 I. C. C. 81), and in the 62nd I. C. C. 69, with the intrastate scale fixed by the Georgia Commission by its order of April 15, 1925.

These comparisons are discussed by the witness at page 483 et seq. At page 483 the same witness testifies:

> "It is the contention of the Atlantic Coast Line Railroad that its interstate mileage scale on logs represents a level of rates none too high, and that if all of our log traffic could be handled at the rates contained in this interstate mileage scale the revenues obtained from the log traffic would be in much fairer proportion to the revenues obtained from other classes of traffic."

That there is need of uniformity of rates on logs in this territory is shown at pages, 495, 496, and 516.

That the whole inquiry was a territorial one is shown throughout the record, and that this witness has testified as to territorial conditions (R. 507, 508).

At page 516 the same witness testifies:

> "We think it would be unfortunate to destroy uniformity by not adopting for interstate application from South Carolina to Georgia, a scale that differs only in minor details from the Alabama Commission scale, which is already in effect, particularly in view of the fact that under the scale that has been ordered by the Commission in these South Carolina cases, we would get that uniformity by making reductions for three blocks of distances, and making increases for three blocks of distances of one-half cent, and reduction of four blocks of distances of one-half cent."

He then testifies as to the effect of this on the traffic in Alabama, South Carolina, North Carolina, and Georgia.

The record shows no testimony of the dissimilarity of transportation conditions in North Florida as compared with those in Georgia. The Commission fixed in this proceeding interstate rates on logs from northern Florida points to Georgia points, which rates it declared to be reasonable. The divergence between those rates and the Cummer scale rates, which are condemned in this proceeding, has been pointed out, and it is extreme.

We must remember that the Commission is a tribunal not only appointed by law, but informed by experience, and that it is entitled to use that experience and its "knowledge of

conditions and environment and of transportation relations in weighing evidence."

See Illinois Central R. R. vs. I.C.C., 206 U. S. 441, 454.

The rates used in making comparisons were rates on the same commodity moving in the same territory, as for instance, logs moving over the Seaboard Air Line Railway and the Georgia, Southern & Florida Railway; and rates on the same commodity in the immediate adjoining territory, such as rates on logs in Georgia and Alabama. They were rates on commodities having similar transportation qualities moving not only in the same territory, but over the same rails, such as brick, lime, stone and cement moving over the lines of the Atlantic Coast Line in Florida and over the lines of the Seaboard Air Line in Florida, and on the same commodities moving in joint territory—Georgia, Alabama, etc. Comparisons were made against rates on the same commodity moving in interstate commerce from the same territory, which rates were prescribed by the Commission in this particular hearing, to-wit, interstate rates on logs moving from North Florida points into Georgia, and the rates made by the Interstate Commission on the same commodity moving to Georgia and Alabama, and between South Carolina and Florida, and other places. Those rates previously established by the Commission and presently established by it became proper standards, fully recognized as proper standards by this Court in Louisville & Nashville R. R. vs. United States, 238 U. S. 1, 15, from which we quote:

> "Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may rise a presumption that the single rate

> is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate."

Comparisons of rates have been used by the Commission as a standard of reasonableness in an untold number of cases. Some of these are noted in Volume 2, Consolidated Digest of Decisions under Interstate Commerce Act, by Lust, at page 1569, and in Volume 10 of the same work, beginning at page 879.

The log rates under the Cummer scale as compared with the other log rates on the Seaboard Air Line, the Georgia, Southern & Florida, and the rates for other commodities moving in fairly close proximity to the Atlantic Coast Line, show that the Cummer scale rates are so low as to be thoroughly unreasonable. Certainly there was sufficient evidence to justify the finding that the rates were unreasonable.

PART TWO

BRIEF OF THE LAW AND ARGUMENT

SYNOPSIS OF THE BRIEF OF THE LAW

I. The question involved is one of discrimination, and burden on Interstate Commerce and that is a question of fact *Page* 62

Virginian Ry. vs. U. S., 272 U. S. 658.

II. Finding by the Commission of unreasonable discrimination, being supported by substantial evidence, will not be reviewed by the Court. *Page* 63

Virginian Ry. vs. U. S., 272 U. S. 658;
Tagg Bros. & Moorhead vs. U. S., 74 L. Ed., 287, 295;
New England Divisions Case, 261 U. S. 184, 204.

III. Statute law to be applied. *Page* 64

Section 2 of the Act to Regulate Commerce;
Section 3 (1);
Section 13 (1), (2), (3), and (4);
Section 15 (1);
Section 15a (2), (3), (4), (5) and (6).

IV. First opinion of the District Court in this case. *Page* 71

V. Second opinion of the District Court in this case. *Page* 72

VI. The Interstate Commerce Commission has the power to enter the order which was entered in this case because the Florida intrastate rates (the Cummer scale of rates), which were supplanted by rates fixed by the Commission, were unduly preferential of intrastate shippers and unduly prejudicial against interstate shippers and shipments and against localities and against

interstate commerce, and unduly preferential of a particular description of traffic. *Page* 73

Sections of the Interstate Commerce Act above referred to; and
Minnesota Rate Cases, 230 U. S. 352;
Houston East & West Texas Ry. vs. U. S., 234 U. S. 342;
American Express Co. vs. Caldwell, 244 U. S. 617;
Wisconsin Railroad Comm. vs. C. B. & Q. R. R., 257 U. S. 563;
Illinois Central R. Co. vs. State Public Utilities Commission, 245 U. S. 493;
Colorado vs. U. S., 271 U. S. 152, 162;
Railroad Commission vs. Southern Pacific, 264 U. S. 331, 347;
Texas & Pacific Ry. Co. vs. Gulf, etc., Ry. Co., 270 U. S. 268, 277;
U. S. vs. Village of Hubbard, 266 U. S. 474;
Missouri Pacific R. R. vs. Boone, 270 U. S. 466.

VII. Congress has exclusive power to deal with the relation of inter and intrastate rates. *Page* 81

Shreveport Case, 234 U. S. 354;
Dayton-Goose Creek Ry. vs. U. S., 263 U. S. 456, 477.

VIII. The disadvantage at which the Cummer scale of rates placed the competitors of Florida manufacturers in the selling market constituted discrimination. *Page* 83

Swift & Co. vs. Georgia Northern Ry. Co., 115 I. C. C. 661;
City of Augusta vs. A. C. L. R. R., 113 I. C. C. 303;
Southwestern Milling Co. vs. A. T. & S. F. Ry., 118 I. C. C. 61;
Arkansas Jobbers & Manufacturers Ass'n vs. A. T. & S. F. Ry., 118 I. C. C. 238;
Blackshear Mfg. Co. vs. A. C. L. R. R. Co., 107 I. C. C. 538;

Consolidated Southwestern Cases, 123 I C. C. 200;
Salt Cases of 1923, 92 I. C. C. 388, 435;
New Mexico Corp. Comm. vs. A. T. & S. F. Ry., 93 I. C. C. 43;
Oklahoma Portland Cement Co. vs. A. & S. Ry., 93 I. C. C. 605;
Oklahoma Corp. Commission vs. A. & S. Ry., 98 I. C. C. 183, 200.

IX. This case is in principle very much like the Pullman Surcharge Cases from the Interstate Commerce Commission. *Page* 84

Surcharge for transportation of passengers in sleeping or parlor cars between points in the State of Alabama, 62 I. C. C. 153;
Surcharge for transportation of passengers in sleeping or parlor cars between points in the State of Georgia, 69 I. C. C. 623.

X. The issue of discrimination under Section 13 (4) was made by the pleadings in this matter before the Commission. *Page* 85

XI. The order of the Commission was not arbitrary because unsupported by the evidence. *Page* 87

XII. The Commission may enter any order which is necessary or desirable to remove unjust discrimination. *Page* 90

Section 13 (4) of the Act;
N. C. & St. L. Ry. Co. vs. State of Tennessee, 262 U. S. 318, 319.

I.

DISCRIMINATION

The question involved is one of discrimination, and discrimination is a matter of fact.

See:

Interstate Commerce Commission vs. D. L. & W. Railroad, 220 U. S. 235, 251;
Pennsylvania Company vs. U. S., 236 U. S. 351, 361;
Virginian Ry. vs. U. S., 272 U. S. 658;
Tagg Bros. & Moorhead vs. U. S., 74 L. Ed. 287, 295.

II.

FINDING BY THE COMMISSION OF UNREASONABLE DISCRIMINATION HAS BEEN SUPPORTED BY SUBSTANTIAL EVIDENCE AND WILL NOT BE REVIEWED BY THE COURT.

I. C. C. vs. D. L. & W. R. R., 220 U. S. 235;
Los Angeles Switching case, 234 U. S. 294, 311.

This Court in Virginian Ry. vs. United States, 272 U. S. 658, stated the rule as follows:

> "Whether a rate is unjustly discriminatory is a question on which the finding of the Interstate Commerce Commission supported by substantial evidence is conclusive, unless there has been some irregularity in the proceeding or some error in the application of rules of law."

At page 663 of the opinion the Court stated:

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

See also:

Western Paper Makers' Chemical Co. vs. U. S., 271 U. S. 268, 271;

Skinner & Eddy Corp'n vs. U. S., 249 U. S. 557, 562;
New England Division Case, 261 U. S. 184, 204;
Tagg Bros. & Moorhead vs. U. S., 74 L. Ed. 287, 295.

We have at some length given an analysis of the evidence offered before the Commission in this case. Practically all of that evidence is uncontradicted. The relation which the Cummer scale rates on logs bear to the rates on other commodities and on the same commodity moving over other lines in Florida and to the interstate rates moving out of Florida and to interstate rates in other comparable parts of the country, and to intrastate rates in other neighboring parts of the country, the quantity of the timber, and the extending of the movement are uncontradicted, and the evidence that the Cummer scale of rates is the lowest scale which the witnesses have been able to find anywhere is also uncontradicted. The fact that the Cummer scale of rates continues up to 170 miles, and then the same commodity moving for longer distances over the same routes and under the same circumstances takes a rate proportionately much greater, is also uncontradicted. These facts would appear not only to make substantial, but conclusive, evidence of the unjust preference of intrastate shipments and the unreasonable discrimination and prejudice against interstate shipments and interstate commerce.

III.

THE STATUTE LAW TO BE APPLIED

There are certain sections of the Interstate Commerce Act, parts of which are relevant to the decision of this case. They are:

(1) Section 2 of the Act, which is as follows:

"Section 2: That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

(2) The first paragraph of Section 3, which is as follows:

"Section 3 (1): That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

(3) Section 13, paragraphs 1, 2, 3, and 4, as follows:

"Section 13 (1): That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of

this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

"Section 13 (2): * * * The Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money."

"Section 13 (3): Whenever in any investigation under the provisions of this Act, or in any investigation

instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any state, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the state or states interested to be notified of the proceeding. The Commission may confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such state regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a state is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such state authorities in the enforcement of any provision of this Act."

"Section 13 (4): Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and the interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice, thereafter to be ob-

served, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding."

(4) Section 15, paragraph 1, which is as follows:

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged or collected, by any common carrier or carriers subject to this Act for the transportation of * * * property * * * as defined in the first section of this Act, * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * * and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect, any rate, fare or charge, for such transportation * * * other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be * * *."

(5) Section 15a, paragraphs 2, 3, 4, 5 and 6, as follows:

"Section 15a (2): In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management, and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. Provided, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

"Section 15a (3): The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation; *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which,

according to the accounting system prescribed by the Commission, are chargeable to capital account."

"Section 15a (4): For the purposes of this section. such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value."

"Section 15a (5): Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

"Section 15a (6): If, under the provisions of this section, any carrier, receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole, irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the provisions of Section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4)."

IV.

FIRST OPINION OF THE DISTRICT COURT
(30 Fed. 2d, 116, R. 44)

The Court below in its first opinion rendered on the 17th of January, 1929 (30 Fed. 2d, 116, 118, R. 44), divided the contentions which were made against the validity of the order into four parts:

First: "Is the order within the lawful powers of the Commission?"

Second: "Is it within the issues sought to be investigated and made after full hearing of them?"

Third: "Is it arbitrary because unsupported by sufficient evidence?"

Fourth: Is the order broader than the evidence?

The Court found against each of these contentions, and found in the third division of the opinion (p. 120) as follows:

> "We find substantial evidence to sustain the conclusions of the Commission on all material points."

The Court in that opinion construed the order as being applicable to shipments originating in that part of Florida on the Coast Line "north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs" (p. 121, R. 50).

V.

SECOND OPINION OF THE DISTRICT COURT

The second opinion by the Court (31 Fed. 2d, 580, R. 167) was rendered March 22, 1929, after the Commission had ordered that its order of August 2, 1928, be "changed in language for the purpose of clarification as follows: In the fourth paragraph, substitute for 'within the State of Florida' the following: 'within and throughout the entire State of Florida, without exception'."

This removed what the Court had deemed to be an ambiguity in the first order (31 Fed. 2d, 581, R. 167). The Court then stated:

> "We have, therefore, to examine the record more closely, and see if a state-wide change of the rate is sustainable."

The Court found that "the evidence does not show any actual or potential interstate commerce in South Florida in such logs as are involved in this rate". It also found that there was no discrimination against shippers and localities and no undue discrimination against "the *particular* interstate commerce in such logs". The Court did find as to the South Florida shipments that there was a discrimination "against *general* interstate commerce". The Court also found that "the hearing was full, within the meaning of the statute, and the power of the Interstate Commerce Commission not abused" (p. 583, R. 170), and that the order was sustained by the evidence "on the ground that the former State rate was an undue discrimination against general interstate commerce over the Coast Line Railroad" (R. 169).

No question was raised in the Court below as to the constitutionality of Section 13 (4) (R. 46). The Court in noticing this (30 Fed. 2d, 118) said:

> "Such an attack would probably be sufficiently met by what was said in the suit of Wisconsin Railroad Commission vs. C. B. & Q. Railroad, 257 U. S. 563" (R. 46.)

VI.

THE POWER OF THE COMMISSION TO PASS THE ORDER.

It would seem that, under the decisions of this Court, beginning especially with the Minnesota Rate Cases, 230 U. S. 352 (in fact beginning with Gibbons vs. Ogden, 9 Wheat. 1), there should be no doubt as to the jurisdiction of the Commission:

See:

Houston East & West Texas Ry. vs. United States, 234 U. S. 342;
American Express Co. vs. Caldwell, 244 U. S. 617;
Wisconsin Railroad Commission vs. C. B. & Q. R. R., 257 U. S. 563;
Illinois Central R. Co. vs. State Public Utilities Commission, 245 U. S. 493;
New York vs. United States, 257 U. S. 591.

The finding of the Commission, as is pointed out in the Court below (R. 45, 30 Fed. 2d, 118) "is in the very words of Section 13 (4) of the Interstate Commerce Act". The intrastate rates which were fixed by the Interstate Commerce Commission in this proceeding are stated by the Commission (R. 25) to be "less than half of the proposed interstate rates" and to be "less than reasonably compensatory". The interstate rates referred to as proposed are the same rates as those which were ordered into effect (R. 27). The disparity found by the Commission, and shown by the undisputed evidence, to exist is quite as great, if not greater, than that condemned in Houston & Texas Ry. vs. United States, 234 U. S. 343, and pointed out at page 346.

There was thus a finding that the entire Cummer scale of rates was "less than compensatory". There was great disparity between those rates and the rates fixed as reasonable for interstate movement by the Commission. The Cummer scale was less than compensatory wherever it applied. The rates in Florida, state and interstate, south of the line described as north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, are generally higher than the rates north of that line (R. 489). The discrimination, therefore, worked against interstate commerce by the Cummer

scale, applicable from points of origin south of that line, was more pronounced than the discrimination north of the line. The discrimination against persons and localities worked by the Cummer scale was very pronounced in the northern part of the State. The preference of this particular description of traffic is obvious.

It has been pointed out that the Georgia manufacturer buying logs in Florida and shipping them to his mills in Georgia on the Atlantic Coast Line pays a rate much in excess of what would be paid by the Florida manufacturer for like transportation of the same logs. The inevitable result is that the movement of this traffic is directed to Florida manufacturing points and away from Georgia manufacturing points. The Commission has found unlawful discrimination against persons and localities and against interstate commerce on evidence which would seem to be compelling, certainly substantial.

The amount of the traffic involved is enormous, being measured in hundreds of thousands of car loads. The amount of the revenue involved is very large. These facts make an unreasonable preference of intrastate shippers and an unreasonable prejudice against and burden upon interstate commerce, and an unreasonable preference of this particular description of traffic. The Congress, by the Transportation Act (Section 15a of the Act to Regulate Commerce), intended "to maintain an adequate railway service for the people of the United States". (Wisconsin Case, 257 U. S. 585.)

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. * * * If the rates, on which such receipts are based, are to be fixed at a substantially

lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the Act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

257 U. S. 585, 586.

Section 15a does not confer power upon the Commission to deal with intrastate rates, but it became a part of the Interstate Commerce Act and the power is, of course, conferred by other sections of the Act.

Section 13 (4) of the Act is also taken from the Transportation Act, and this vested the Commission with a direct power to remove "any undue, unreasonable or unjust discrimination against interstate or foreign commerce".

This Court says:

"It is impossible to escape the dovetail relation between that provision and the purpose of § 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it", etc.

257 U. S. 586.

Wherever logs are shipped from Florida points within 170 miles of the Georgia mills on the Atlantic Coast Line, and there are 65 of them in Georgia within a radius of 170 miles of the Georgia-Florida line, there is a direct discrimination against those mills and the Georgia communities in which they are situated. Wherever logs are shipped in Florida intrastate on the Atlantic Coast Line Railroad under the Cum-

mer scale, whether or not those logs could be shipped into Georgia for manufacture, there is an unjust discrimination against interstate commerce because those rates and that transportation do not share their fair part of the cost of maintaining an adequate railway system, and in not bearing that part of this cost, it is placed upon the other commerce, including interstate commerce. These same facts make undue preference of this particular description of traffic.

This unduly low rate for logs, wherever it is applied, enables the manufacturer in Florida to have an undue advantage in the interstate markets of consumption as compared with any manufacturer not so favored.

The power to prevent this burden being placed upon interstate commerce has been exercised in a good many ways, as in the abandonment by the railroad, as to both intra and interstate traffic, of a branch line lying wholly within the state of the owning company's incorporation. This authority is exercised "not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination".

Colorado vs. United States, 271 U. S. 152, 162.

> "Excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates."

271 U. S. 163.

In the Colorado case the Court states:

> "The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishes intrastate rates so low

that intrastate traffic does not bear its fair share of the cost of the service."

271 U. S. 163.

An order of a State commission requiring a carrier to erect a union station so expensive as unduly to deplete the financial resources of the carrier may not be effective without an order of the Interstate Commission, and this because it was "the purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform their interstate functions".

Railroad Commission vs. Southern Pacific,
264 U. S. 331, 347.

The preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern.

Texas & Pacific Ry. Co. vs. Gulf, etc., Ry. Co.
270 U. S. 268, 277.

The increase by the Interstate Commerce Commission of intrastate railway affairs, which subject interstate commerce to unjust discrimination, was sustained in United States vs. Village of Hubbard, 266 U. S. 474.

It is clearly intimated that a burden may be put upon interstate commerce by a State fixing full statutory liability for the transportation of baggage, and that this may be removed by order of the Interstate Commerce Commission.

See Missouri Pacific R. R. vs. Boone, 270 U. S. 466.

It was contended that under Section 13 (4) the Commission had no right to interfere with the Cummer scale of rates

because that scale was not "made or imposed by authority of any state." There are several replies to this position.

The first is, that the rate was imposed by the authority of the State of Florida. It is true that the origin of this situation was in contract. We have pointed out that when the Atlantic Coast Line filed its tariffs with the Florida Commission governing transportation, this tariff was rejected because it applied to only train loads and not over the entire line of the carrier. The carrier then filed a second tariff which was again rejected because of its restrictions. Finally, the Commission permitted the filing of a tariff quite different from that sufficient to satisfy the contract and which made the rates applicable, not only in train loads but in car load lots, and also over any part of the line of the carrier up to 170 miles so that the rate as it is was made and imposed by the Florida Commission. The Florida Commission appeared in the hearing before the Interstate Commerce Commission and is a party litigant in the cases now before the court in opposition to the withdrawing of the rates by the Atlantic Coast Line. The failure of the State of Florida to permit the withdrawal of the rates is equivalent to imposing the rates. The construction of the law is entirely too narrow. It is based upon the provisions of Section 13 (3) which we have set out above. Section 13 (3) does not add to or detract from the jurisdiction of the Commission. It is procedural and requires, when the Commission considers the rate, etc., made or imposed by the authority of any State or initiated by the President during the period of Federal control, that the Commission "before proceeding to hear and dispose of such issue, shall cause the state or states interested to be notified of the proceeding."

That simply requires that in those circumstances the Commission shall proceed in a manner different from that in which it would proceed if the rate was not so made. Section 13 (4) provides that the Commission, when in such investigation, after full hearing finds that any such rate, etc., causes any undue or unreasonable advantage, preference, or prejudice, etc., to make other rates, charges, classification, etc.

In Section 13, subsection 1, the Commission is authorized to make investigations of complaints initiated before it by any person at interest, including any body politic or municipal organization. Under subsection 2 it is authorized to investigate in a complaint by the Railroad Commissioner or Railroad Commission of any state. It is also authorized to make an investigation on its own account.

The words "such rate, fare, charge, etc." referred to in Section 13 (4) means the rate, fare, charge, etc. brought under investigation by the complaint which had been filed with the Commission.

The construction contended for by the appellants is equivalent to saying that a carrier by filing a rate with a State Commission takes that rate out of the jurisdiction of the Interstate Commission, whereas, if the rate had been made or imposed by the authority of the state, it would be within the jurisdiction of the Interstate Commission, thereby giving to the act of the carrier a greater power than was given to the orders made by the President during the period of Federal control and greater than is reserved to the States. Such a construction, of course, should be adopted only when some superior authority compels its adoption.

It is doubtful if any rate which can be effective within a state only when it shall have been filed within the Commission is not made or imposed by authority of the state within the meaning of the statute. We feel very sure that the construction contended for is wholly incorrect.

There is a marked inconsistency in the positions taken by counsel for appellants in their brief. They insist that an extraordinary amount of evidence should have been introduced before the Commission to justify it in overcoming the act of the State of Florida, and then deny that the rate removed was imposed by the authority of the State of Florida.

VII.

THE RELATION OF THE INTER AND THE INTRASTATE RATES.

> "The power to deal with the relation between the two kinds of rates as a relation, lies exclusively with Congress. It is manifest that the State cannot fix the relation of the carriers' interstate and intrastate charges, without directly interfering with the former, unless it simply follows the standard set by the Federal authorities."
>
> Shreveport Case, 234 U. S. at 354.

See also Dayton-Goose Creek Ry. vs. United States, 263 U. S. 456, 477, where the Court held that Sections 418 and 422 of the Transportation Act "conferred on the Commission valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly burden it".

The order of the Commission in this case amounts to a fixing of relations between the two classes of rates on this commodity.

> "The power of Congress to regulate interstate commerce includes the power to foster, protect and control it, with proper regard for the welfare of those who are immediately concerned as well as of the public at large."
>
> Dayton-Goose Creek Ry. vs. United States,
> 263 U. S. 456, 478.

The Transportation Act, Section 15a, contemplated that there should be a net operating income equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. That return is not from interstate traffic alone but from all of the traffic, state or intrastate. Under the recapture clause of Section 15a, the income to be taken into consideration is the income from all traffic, and Congress has control of "that part of the excess possibly due to intrastate rates, which if present is indistinguishable".

> Dayton-Goose Creek Ry. vs. U. S., 263 U. S. 485.

So the power in the Commission to deal with the relation of rates would appear to be indispensable to the plan of Congress.

> "The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate transportation system as Congress has planned it."
>
> Dayton-Goose Creek Case, 263 U. S. 485.

VIII.

DISADVANTAGE IN THE SELLING MARKET CONSTITUTES DISCRIMINATION.

The Commission has on a number of occasions held that the difference in the level of intrastate and interstate rates may be removed.

See the case of Swift & Co. vs. Georgia Northern Ry. Co., 115 I. C. C. 661. In that case the rate on hogs shipped from Dothan, Alabama, to Montgomery, Alabama, was about $12.00 below the rate to Moultrie, Georgia; the distance to Montgomery being 119 miles and to Moultrie 121 miles. The Commission removed that discrimination.

In City of Augusta vs. A. C. L. Railroad, 113 I. C. C. 303, an unjust discrimination was found against Augusta in favor of points in South Carolina. The market competition was stressed at pages 306 and 307.

The granting of an allowance of milling in transit to intrastate traffic and a denial to interstate traffic was declared unduly prejudicial in Southwestern Milling Co. vs. A. T. & S. F. Railway, 118 I. C. C. 61.

Some other cases to the same kind of purport are:

Arkansas Jobbers & Manufacturers Ass'n vs. A. T. & S. F. Ry., 118 I. C. C. 238:
Blackshear Mfg. Co. vs. A. C. L. R. R. Co., 107 I. C. C. 538;
Consolidated Southwestern Cases, 123 I. C. C. 200;
Salt Cases of 1923, 92 I. C. C. 388, 435;
New Mexico Corp. Comm. vs. A. T. & S. C. Ry., 93 I. C. C. 43;

Oklahoma Portland Cement Co. vs. A. & S. Ry.,
93 I. C. C. 605;
Oklahoma Corp. Commission vs. A. & S. Ry.,
98 I. C. C. 183, 200.

Other cases on this subject are cited in Vol. 10 of the Abridged Reports and Current Digest of the I. C. C. by Lust, page 883.

IX.

PULLMAN CHARGE

The Interstate Commerce Commission, in the matter of Surcharge for Transportation of Passengers in Sleeping Cars or Parlor Cars between points in the State of Alabama, (62 I. C. C. 153), held that:

> "Charges for the transportation of passengers in sleeping and parlor cars required by state authority to be maintained by the respondent steam railroads within the State of Alabama found to be lower than the corresponding interstate charges authorized in Increased Rates, 1920, 58 I. C. C. 220, and to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce."

The same ruling was made as to like transportation in the State of Georgia (69 I. C. C. 623).

In principle this case at bar is not unlike those Pullman Surcharge Cases.

X.

THE ISSUE OF DISCRIMINATION WAS MADE BY THE PLEADINGS BEFORE THE COMMISSION.

A petition to the Commission is required to "briefly state the facts". (§ 13 of the Act.) The Court below found that this question had been properly made (R. 48, 49).

In the petition of the Georgia Public Service Commission to the Interstate Commerce Commission, in paragraph 3 thereof, it is alleged as follows (R. 193):

> "That the object of this complaint is to secure reasonable rates on logs from all points on the Atlantic Coast Line Railroad, as hereinafter shown within the State of Florida to all destinations on the said Atlantic Coast Line Railroad in the State of Georgia, *and to have removed any unjust discrimination or undue prejudice found to exist as provided in the Interstate Commerce Act.*"

In paragraph 11 of the petition (R. 196) it is charged that the Florida rates "give undue and unreasonable preference and advantage to intrastate shippers in Florida; and are unduly prejudicial and disadvantageous to the interstate shipper in Georgia, and causes undue and unreasonable and unjust discrimination against interstate commerce in the violation of Section 13 of the Interstate Commerce Act".

The prayers of the petition (R. 197) ask an order requiring the Atlantic Coast Line "to cease and desist from the aforesaid violation of the Interstate Commerce Act"; and that the Commission prescribe "just, reasonable, non-discriminatory and non-prejudicial interstate rates to be observed and charged in the future by the defendant carrier for the trans-

portation of carload shipments of logs, from all points located in the State of Georgia; that the measure of said rates be no higher than the rates concurrently in effect for the same kind of property, from producing points located within the State of Florida, moving in intrastate commerce, to destinations within the State of Florida".

The petition then has a prayer for such other and further orders as the Commission may consider proper in the premises.

In the petition to intervene by the Putnam Lumber Company (R. 215, Par. 13) there is an allegation "that said intrastate rate does not unjustly discriminate against interstate commerce". The intrastate rate referred to is the Cummer scale.

In the second amended petition for leave to intervene the Georgia-Florida Saw Mill Association (R. 220) alleged:

> "That the level of Florida intrastate rates is involved as evidenced by paragraph 8 of complaint and as further evidenced by averment of intervening carriers, viz: Seaboard Air Line Railway Company, Central of Georgia Railway Company, Southern Railway Company, and Georgia, Southern & Florida Railway Company."

At page 225 of the record is the intervention of the Seaboard Air Line, Central of Georgia, Southern Railway, and Georgia, Southern & Florida. The intervention shows that these roads are opposed to the continuance of the said intrastate rates in Florida or the adoption of these rates for interstate application between points in Florida and points in Georgia via the lines of the Atlantic Coast Line Railroad Company, or otherwise, and whether for the purpose of estab-

lishing reasonable maximum rates under Section 1 of the Act or for the purpose of removing undue discrimination as complained of in the complaint filed in this proceeding.

The intervention of the American Short Line Railroad Association (R. 227) also shows that this question of discrimination is in issue.

The petition for leave to intervene by Brooks-Scanlon Corporation (R. 230, at 231) also puts this question of discrimination in issue.

The Court below found against this contention (30 Fed. 2d, 120) (R. 48).

It is difficult to understand any basis for this contention.

The Governor of the State of Florida had been notified and the Florida Railroad Commission appeared in defense of the rates.

XI.

THE ORDER OF THE COMMISSION WAS NOT ARBITRARY BECAUSE UNSUPPORTED BY THE EVIDENCE.

The answer to the contention that the order was arbitrary because unsupported by the evidence is, of course, the evidence itself which we have undertaken to summarize, which is clearly sufficient and, as we believe, compelling. The facts found by the Commission in its report are amply, fully, and compellingly sustained by the record.

It is insisted by appellants that the Commission exceeded its authority and the evidence in making its order, which upsets the Cummer scale, apply wherever the Cummer scale

applied. The Cummer scale applied on only the Atlantic Coast Line Railroad and only for distances not greater than 170 miles. It did not apply to joint transportation nor to rail and water transportation. The court in its first opinion, which undertook to construe the order of the Commission as limited "to points of origin on the Coast Line Railroad north of and including Jacksonville, Gainesville, Burnett's Lake and High Springs" (R. 50), did so "from a cursory search of the record"; the court's language being:

> "From a cursory search of the record it appears to be true that the evidence, though often broadly phrased, really related to the logs in north Florida," etc.

The Commission did not share that view, and after the rendition of that opinion it made the amendment of February 7, 1929, and declared that its order should be operative "within and throughout the State of Florida. without exception" (R. 167).

The court in its second opinion, after noting that the original order had been thus clarified, said:

> "We have, therefore, to examine the record more closely and see if a state-wide change of the rate is sustainable. Except as to the territorial application of the order, we find no occasion to modify what was previously ruled."

We thus see that the first opinion was rendered upon a cursory examination of the record and was based upon a construction of the language of the order. The Commission, having due respect for the court and being mindful that its purpose was to make the order state-wide, made the clarification it its order to which we have above referred. The court then felt under the necessity to and did "examine the record more

closely and see if a state-wide change of the rate is sustainable."

The court found that it was sustainable.

Amongst the reasons assigned as to why this order should not have been state-wide is that the Atlantic Coast Line was the only carrier against whom the petition was filed. The answer to that is three-fold: The first is, that the Atlantic Coast Line is the only carrier in Florida over which the Cummer scale was applicable; the second is, that the rates on the other carriers, as we have shown in the synopsis of the evidence in this brief, bear very close relationship to the rates which were established by the Commission; and the third is, that the Seaboard Air Line Railway Company, the Georgia, Southern & Florida Railway Company, and the Central of Georgia Railway Company became parties to the proceedings by intervention.

TO HAVE MADE THE ORDER LESS THAN STATE-WIDE WOULD HAVE CREATED THE UTMOST CONFUSION.

The contention is that the order should have been limited to the line which has been described and which includes Jacksonville, Gainesville, Burnett's Lake and High Springs, Florida. That would have left the mills at Palatka, Lacoochee, Lake Wales, Seers, Sherman and Holopaw and all other mills and timber south of the line out of the effect of the order. It would have left great tracts of timber south of the line having the benefit of the rates, while tracts north of the line would not have had it. It would have produced the anomaly of having log trains move over the same track almost for the entire distance to Jacksonville and Eastport and Milldale, one train carrying logs at one rate and another train carrying logs at a

wholly different rate. It would have produced the anomaly of having a shipper pay one rate for logs cut from his own property south of the line and another rate on logs cut from another part of his property north of the line, though they moved in the same train to the same destination. It would have put the timber north of the line at a disadvantage as compared with the timber south of the line. It would have enabled the manufacturer at Lake Wales, which is in the center of the state, at Seers, which is in the far southern part of the state, at Sherman, which is in the southeastern part of the state, and at Holopaw, which is south of Tampa, at a tremendous advantage over the manufacturer at Jacksonville, or Eastport, or Milldale. It would have given the manufacturer at Palatka, which is near Duval County, in which Jacksonville, Eastport and Milldale are located, a tremendous advantage over the manufacturer at Jacksonville. It would have accentuated the wrong which needed to be eradicated. Such an order would have failed because of its own defects.

XII.

THE NATURE OF THE ORDER WHICH THE COMMISSION MAY PASS.

The Commission may enter any order which is necessary or desirable to remove the unjust discrimination which it finds to exist, whether that be as to making a general body of rates or as to making a single rate or as to making a single rate to a particular shipper.

Note N. C. & St. L. Ry. Co. vs. State of Tennessee, 262 U. S. 318, 319, where the Commission removed an exception to an action of the State of Tennessee authorizing an increase

of intrastate freight rates to correspond with the level of interstate rates "but excluded rates on stone and gravel when for use in building public highways and consigned to federal, state, county or municipal authorities". That exception was found to work an illegal discrimination and restriction.

Section 13 (4) of the Act authorizes the Commission to prescribe "the rate, fare or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner, as, in its judgment, will remove such advantage, preference, prejudice or discrimination". That would appear to empower the Commission to remove the discrimination in any way in its judgment necessary thereto.

The Commission has the right to pass an order sufficient to remove anything which directly obstructs and thus regulates interstate commerce, whether that thing is State legislation or private contract between individuals or corporations.

See New York vs. United States, 257 U. S. 591, 601.

NATURAL RESOURCES

Stress is laid in the brief of opposing counsel on the fact that logs are natural resources, apparently claiming exemption on that account from the ordinary effects of the law.

A State has no power to prevent the movement of its natural resources in interstate commerce nor to prefer its own markets and citizens. The court has dealt with the subject of oil and gas in this respect in Oklahoma vs. Kansas Natural Gas Co., 221 U. S. 229, and in Pennsylvania vs. West Virginia, 262 U. S. 553, 597, and in the cases cited in those cases. These cases hold that the State of production has no right to do that which by necessary operation prevents, obstructs or burdens

the transmission of such natural resources in interstate commerce or which prefers its own markets and citizens as to such resources, and that such acts on the part of the producing State constitute a prohibited regulation of interstate commerce.

We respectfully submit that the order of the Interstate Commerce Commission is fully sustained by both the evidence and the law; that it is clearly proved that the discrimination was not only substantial but extreme; and that this case presents a perfect illustration of the necessity of having the Interstate Commission vested with power adequate to its action therein. It is respectfully urged that the decree of the lower court be affirmed.

Respectfully submitted,

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April 17, 1930.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

STATE OF FLORIDA AND A. S. WELLS, E. S. MATHEWS, ET AL *Appellants,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 493
BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, AND CUMMER CYPRESS COMPANY, *Appellants,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 494
WILSON LUMBER COMPANY OF FLORIDA, *Appellant,* vs. UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.	NO. 495

APPENDIX TO BRIEF ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY

The Atlantic Coast Line Railroad Company attaches hereto four (4) maps of parts of Florida.

Map No. 1 uses Perry as the center of a series of circles. Perry is one of the important places of origin of the shipments of logs involved in this case. The circles in red show the application of the Florida intrastate scale of rates on logs (the Cummer scale). The green circles shown the application of the corresponding rates fixed by the Interstate Commerce Commission as reasonable for intrastate transportation of the same logs in Florida. Three and five-tenths (3.5) cents, under the Commission's scale, will carry 100 pounds of logs 30 miles; three and seven-tenths (3.7) cents will carry 100 pounds of the same logs 170 miles, under the Cummer scale.

Map No. 2 gives the same kind of information, using Hines as the center.

Map No. 3 gives the same kind of information, using Homosassa as the center.

Map No. 4 gives the same kind of information, using Lake Wales as the center.

Each of these maps also shows the location of Sherman on Lake Okeechobee; and of Seers in Hendry County; the approximate location of Holopaw, south of Tampa; and of Lacoochee in Pasco County; all of which are manufacturing centers; and some of the points used by the witness Price in his testimony, such as Hardeetown, Usher, Otter Creek, Lebanon, Tidewater, Steen, Dunnellon, Ladonia, Hernando, In-

verness, Floral City, Pineola, Croom, Trilby, Dade City, and Lumberton. The object of these maps is to visually contrast the two sets of rates and to show the territorial extent of the investigation made by the Commission, as shown by the record in this case.

Respectfully submitted,

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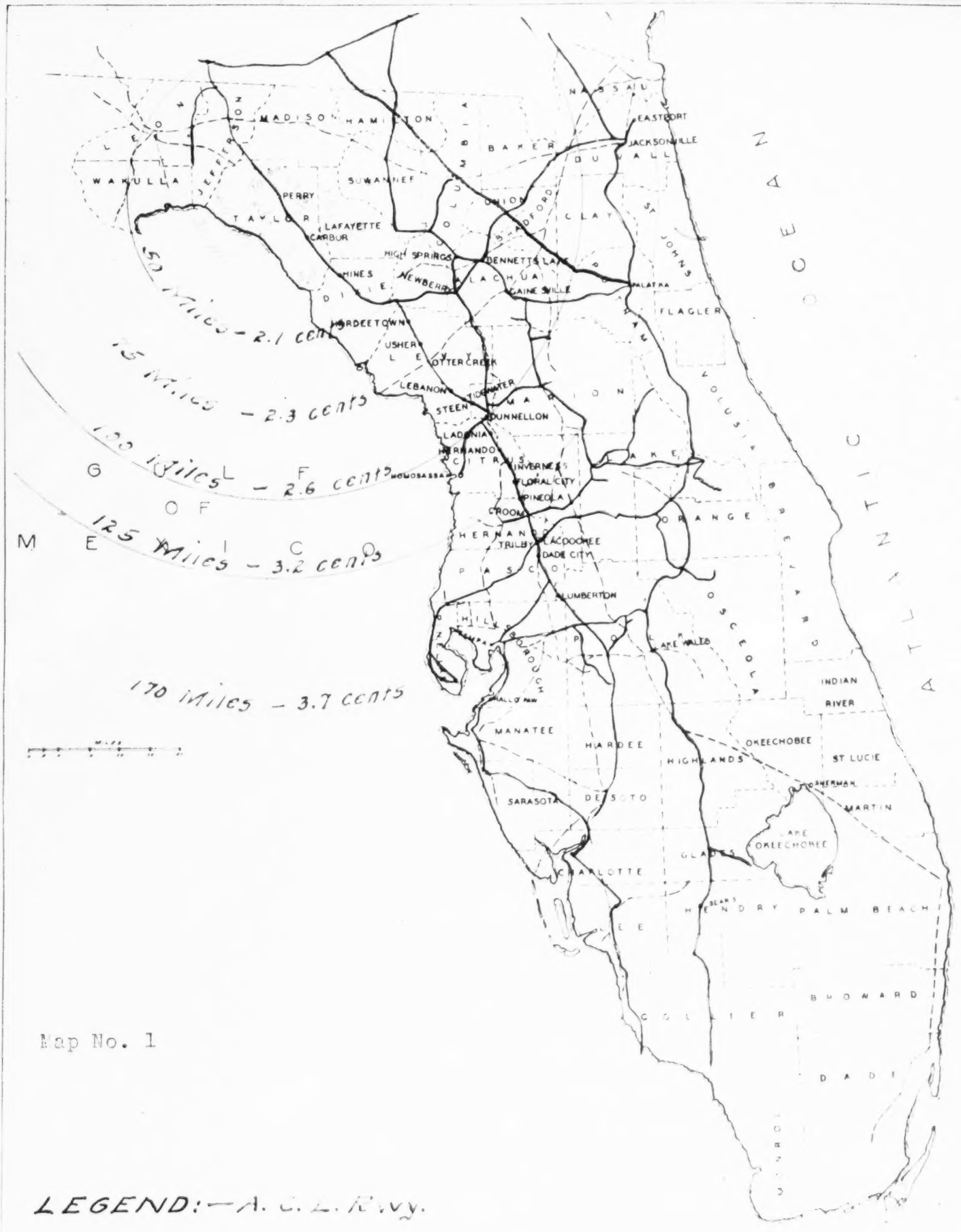
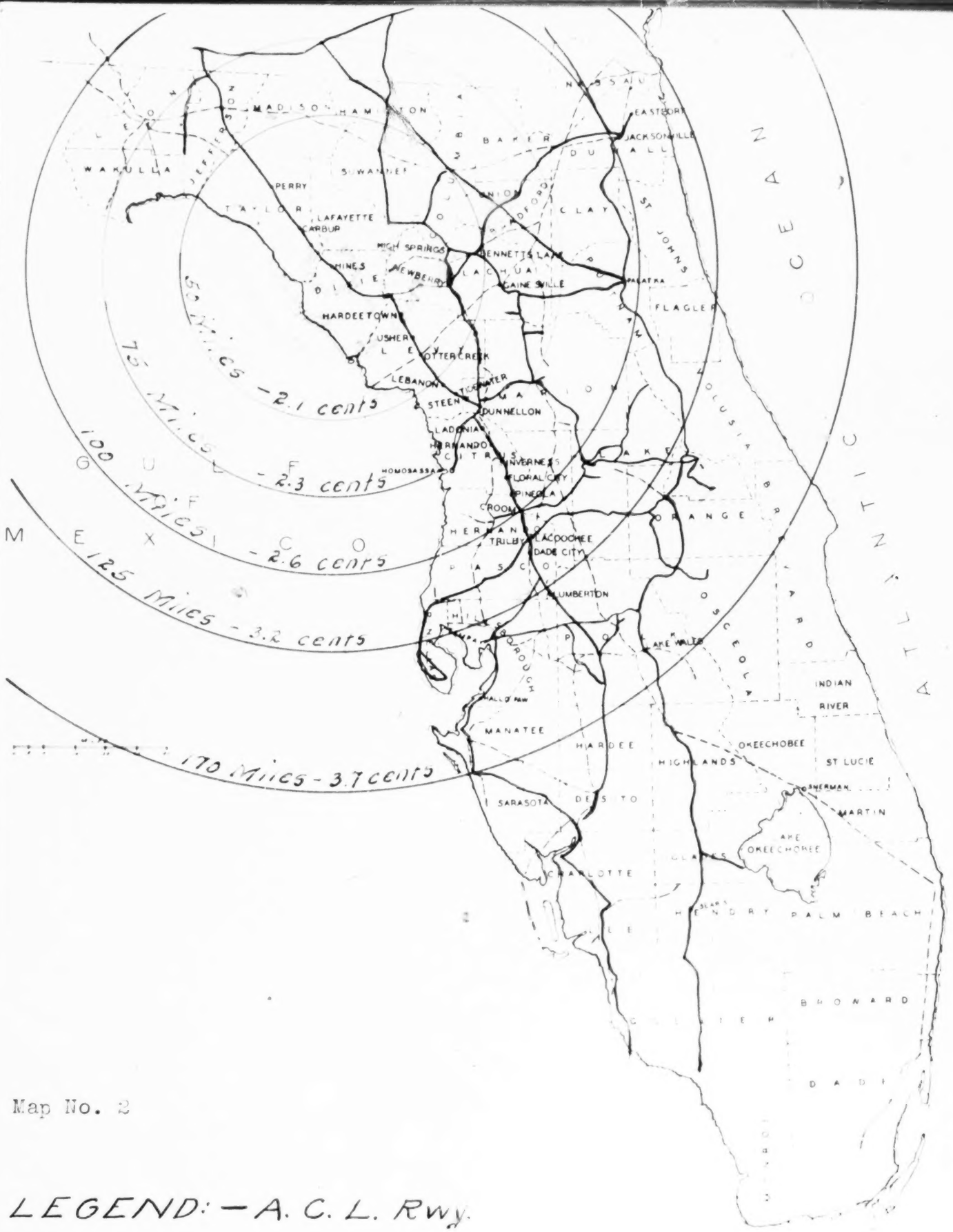
Counsel for Atlantic Coast Line Railroad Company.

April 24, 1930.


50 Miles - 2.1 cents
75 Miles - 2.3 cents
100 Miles - 2.6 cents
125 Miles - 3.2 cents
170 Miles - 3.7 cents
MILEAGE OF FREIGHT RATES
MADISON
HAMILTON
SUWANNEE
BAKER
NASSAU
EASTPORT
JACKSONVILLE
DUVAL
WAKULLA
JEFFERSON
LEON
PERRY
TAYLOR
LAFAYETTE
CARBUR
UNION
BRADFORD
CLAY
ST JOHNS
HIGH SPRINGS
BENNETTS LAKE
MINES
NEWBERRY
ALACHUA
GAINESVILLE
PALATKA
FLAGLER
DIXIE
HARDEETOWN
USHER
LEVY
OTTER CREEK
LEBANON
TIDEWATER
STEEN
DUNNELLON
LADENIA
HERNANDO
CITRUS
INVERNESS
FLORAL CITY
PINELLA
CROOM
LAKE
ORANGE
HERNANDO
TRILBY
LACOOCHEE
DADE CITY
PASCO
LUMBERTON
HILLSBOROUGH
TAMPA
POLK
OSCEOLA
LAKE WALES
INDIAN RIVER
MANATEE
HARDEE
OKEECHOBEE
HIGHLANDS
ST LUCIE
SHERMAN
SARASOTA
DESOTO
MARTIN
LAKE OKEECHOBEE
CHARLOTTE
GLADES
HENDRY
PALM BEACH
BROWARD
COLLIER
DADE
LEGEND:—A. C. L. Rwy.
— Southern Rwy.

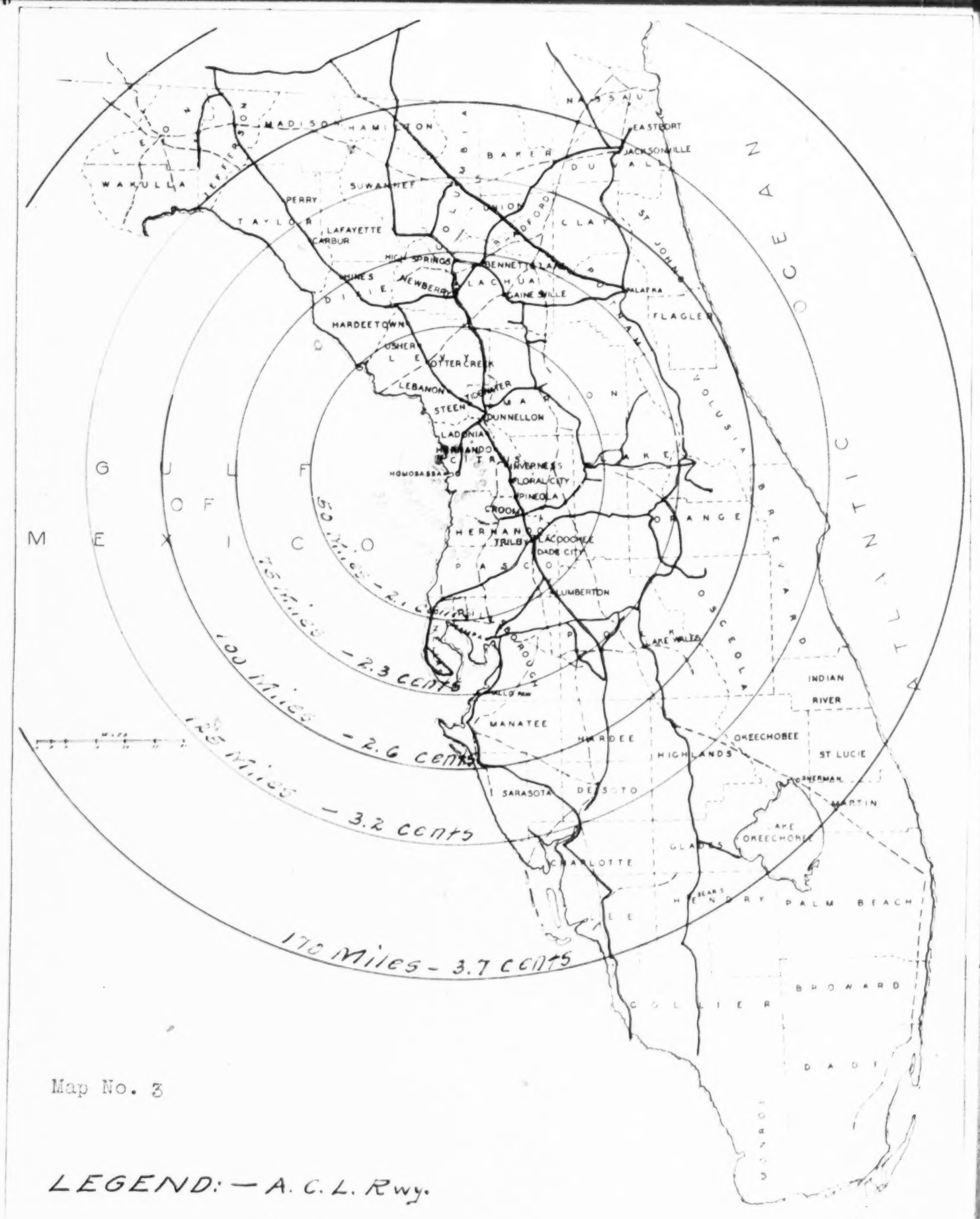
Map No. 1



Map No. 2

LEGEND:— A. C. L. Rwy.

— Southern Rwy.



Map No. 3

LEGEND: — A. C. L. Rwy.

— Southern Rwy.

Map No. 4

LEGEND:—A. C. L. Rwy.

—Southern Rwy.